Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR DIAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the language in this Court's opinion in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) providing that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the *prescribed statutory maximum*" refers to the maximum sentence prescribed under the United States Sentencing Guidelines, because as this Court explained in ***United States v. R.L.C.,*** 503 U.S. 291 (1992), the Sentencing Guidelines are statutes?

II. Whether the Eleventh Circuit's opinion in the instant case regarding the enhancement of the Petitioner's sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) and/or ***Jones v. United States,*** 526 U.S. 277 (1999), where:
(A) the offenses charged in the Indictment did not charge *Diaz* with an offense involving five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 841,
(B) the trial court did not instruct the jury to determine the quantity of cocaine, and
(C) *Oscar Diaz'* sentence was enhanced from a minimum of ten (10) years to twenty (20) years based upon the trial court's factual finding that the quantity of drugs attributable to *Diaz* was five (5) kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A), even through that statute was not charged in the Indictment?

III. Whether an Indictment that does not allege the

minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment after application of the United States Sentencing Guidelines, may be increased from 10 years to 20 years based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

IV. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's minimum punishment under the penalty provisions of the charging statute, may be increased from a range of zero to 20 years to a range of 20 years to life imprisonment, based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant, who has a prior felony drug conviction, had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

V. Whether a trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey***, 530 U.S. 466 (2000) and/or ***Jones v. United States***, 526 U.S. 277 (1999), to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

VI. Whether the proper standard of review is *per se* reversible error where an Indictment that fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial?

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The unreported opinion of the Eleventh Circuit was entered on January 11, 2001. (Pet. App. 17-37). The Eleventh Circuit's unpublished order entitled "On Petition(s) for Rehearing and Suggestion(s) for Rehearing En Banc," was entered on February 27, 2001 (Pet. App. 62), and the Eleventh Circuit's Mandate issued on March 14, 2001.

The appeal to the Eleventh Circuit arose from the Petitioner's Judgment and Commitment entered on November 5, 1999, after a jury trial. (Pet. App. at 4-16).

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 11, 2001. A timely Petition for Rehearing *En Banc*, was filed on February 1, 2001, and on February 27, 2001, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*. (Pet. App. at 58). Thereafter, on March 14, 2001 the Eleventh Circuit issued a Mandate on its Judgment.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 841(a) - Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b) - Penalties - (Excerpt)[1]

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

* * *

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[1] The excerpts include penalties for cocaine only.

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior

convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years

and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is

other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846 - Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 2D1.1 (Excerpt)[2]

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of

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[2] The excerpts include penalties for cocaine, but not cocaine base.

a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(6) If the defendant meets the criteria set forth in subdivisions (1) to (5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.

(c) DRUG QUANTITY TABLE

	Controlled Substances and Quantity	**Base Offense Level**
1	* * * •150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 38
2	* * * •At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 36

	Controlled Substances and Quantity	Base Offense Level
3	* * * •At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 34
4	* * * •At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 32
5	* * * •At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 30
6	* * * •At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 28
7	* * * •At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 26
8	* * * •At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 24

	Controlled Substances and Quantity	Base Offense Level
9	* * * •At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 22
11	* * * •At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 18
12	* * * •At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 16
13	* * * •At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 14
14	* * * •Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants); * * *	Level 12

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OSCAR DIAZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Oscar Diaz, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on January 11, 2001, and Order entered on February 27, 2001, denying his Petition for Rehearing and Suggestion for Rehearing *En Banc*. Said Petition specifically requested a rehearing as to the quantity of drugs attributed to *Diaz* in light of this Court's opinions in ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). (See, Pet. App. at 38-61).

STATEMENT OF THE CASE

A. *Proceedings in the Courts Below:*

The indictment upon which Petitioner *Diaz* was tried alleged in Count I that the defendants conspired to possess

with intent to distribute a "detectable amount of cocaine" in violation of 21 U.S.C. § 846. Similarly, Count II charged possession with intent to distribute a "detectable amount of cocaine" in violation of Title 21 U.S.C. § 841(a)(1) and Title 18 U.S.C. § 2. (R1-22). Neither count specified a minimum quantity of drugs, nor did the minimum quantity of drugs necessary to apply the enhanced penalty provisions of 21 U.S.C. § 841(b).[3]

After deliberating for five and one-half (5 ½) hours, the jury convicted *Diaz* of Counts I and II. (R8-311,317-318).

At sentencing, *Oscar Diaz* vigorously objected to the quantity of cocaine, and requested a downward departure for minor role and from the career criminal enhancement. (R1-115, 117). The PSR attributed a total of 14,043 grams of cocaine to *Diaz* by arguing that the cocaine was in "plain view" or was otherwise foreseeable. *Diaz* argued that the cocaine was not in plain view, and the evidence failed to show that he had constructive possession of the cocaine, because the evidence did not show that: (1) *Oscar Diaz* observed or knew that the duffle bag that defendant Chavarry picked up during the five (5) minutes that Chavarry was in apartment 209 contained any cocaine, (2) *Oscar Diaz* entered the hallway or master bathroom of apartment 209, or observed or knew that either bathroom had cocaine secreted in the walls; (3) *Oscar Diaz* observed any cocaine inside the apartment,[4] and/or (4) the apartment was an obvious stash house. (R1-115).

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[3] The Indictment also contained a forfeiture provision pursuant to Title 21 U.S.C. § 853, which only itemized $52,000 seized from co-defendant Rafael Chavarry, Jr. (R1-22-2).

[4] Based upon the lower purity of the cocaine on the kitchen counter, a properly instructed jury could have found that Diaz only conspired and intended to possess or attempt to possess with the intent to distribute the cut cocaine.

However, for the purposes of sentencing, *Diaz* argued that the most that the Government could argue that he could have observed was the 994.1 grams 45% pure cocaine located on the kitchen counter - - which was approximately *half* the purity of all the other cocaine found in the bathrooms or duffle bag. (R1-114,115; R6-103-4,114-15, 137; R11-80-89).

After denying all of *Oscar Diaz'* objections except as to the fine, the District Court sentenced *Diaz* to a 20 year mandatory minimum term of imprisonment, followed by a term of 10 years supervised release. (R2-160).

Without oral argument, the court of appeals affirmed *Diaz's* conviction and sentence, and denied his Petition for Rehearing and Suggestion for Rehearing *En Banc*, in which *Diaz* urged the Eleventh Circuit to apply this Court's ruling in ***Apprendi*** to the trial court's findings regarding the quantity of cocaine attributable to *Diaz*. (Pet. App. at 17-37,62).

B. *Statement of Facts:*

On April 15, 1999, an officer surveilled a residence that was "part of an ongoing investigation," and observed a dark colored Toyota Tercel parked outside. (R6-9,11). After surveilling the residence for approximately four and one-half hours, the officer observed *Oscar Diaz* exit the residence alone, with nothing in his hands, enter the Toyota and drive off to another unspecified residence where he exited empty handed, and entered for approximately ten minutes. *Diaz* then exited the residence - empty handed, and drove off in the Toyota. (R6-11-13).

The officer next surveilled *Diaz* drive to Rafael Morales' house (his cousin). (R6-13-14,42). When *Diaz* arrived, several individuals were standing outside of the Morales residence. *Diaz* exited the Toyota - again empty handed, and walked over and talked for a couple of minutes to Morales and Rafael Barreto. (R6-14). No officer or other witness overheard the conversation. (R6-15,44-45).

Thereafter, *Diaz* reentered the Toyota and backed out of the driveway. (R6-14). In the meantime, Morales and Barreto entered a black Acura, backed out, and followed *Diaz's* vehicle to a shopping plaza in Miami, where he parked and left it. (R6-15). After arriving at the shopping plaza, *Diaz* exited the Toyota and walked toward the Acura. While *Diaz* walked toward the Acura, Morales and Barreto exited and walked toward two pay phones at the shopping center with *Diaz* accompanying them. (R6-15-16). No officer or other witness overheard any conversations, or observed anyone making phone calls. (R6-44-45).

Minutes later, *Diaz* walked alone over to a bakery. (R6-16,44). While *Diaz* was at the bakery, Morales and Barreto conversed. (R6-44-45). *Diaz* later exited the bakery carrying a white paper bag and a coffee cup, and joined Morales and Barreto. (R6-44-45). *Diaz* then used the pay phone while Morales sat on the curb, however, no evidence showed who *Diaz* called or what was discussed. (R6-15-16,44-45).

After approximately twenty minutes, Morales looked down at his belt buckle, removed his "pager" and showed it to *Diaz*. (R6-17-18,46). However, no pager was ever seized from Morales and no evidence showed that the one beeper that was later found in the Fountainbleau apartment belonged to or was used by Morales, or received a call from anyone that day. (R6-17-18,185-86). During the 20 minute period before Morales allegedly received a beeper call, Morales, *Diaz*, and Barreto "were just talking amongst each other, laughing, having conversations," (R6-17), and none of the men engaged in any counter-surveillance activities. (R6-15-18).

Morales, *Diaz* and Barreto then went over to the pay phones and Morales, *not Diaz*, placed a phone call. Again, no evidence showed who Morales called or the content of the conversation. (R6-17-18).

Thereafter, Morales, *Diaz* and Barreto walked to and entered the Acura with Morales driving, Barreto in the front passenger's seat, and *Diaz* in the back seat. (R6-18-19). Morales drove the Acura back to his residence, stopped for a

few minutes, and then drove to a Winn Dixie grocery store. (R6-64-65,91-92). Upon entering the parking lot, Morales drove up and down the aisles, and then stopped for several minutes next to a white Chevrolet Blazer. (R6-66-67). While stopped by the Blazer, Morales appeared to engage in a conversation with Rafael Charvarry. (R6-65-67,92-94). However, no officer or other witness overheard the conversation. (R6-66-67).

Charvarry then followed Morales to an apartment complex. (R6-67-68,95). Morales, *Diaz* and Barreto exited the Acura and walked toward an archway at the entrance of the building - empty handed. (R68-71,108). Upon reaching the archway, one of the three individuals motioned for Chavarry to come over to the archway. *Id.* However, no evidence showed that *Diaz* motioned for Charvarry. (*Id.*, R6-81-82).

The four individuals walked upstairs and entered apartment 209. (R6-99-100). Approximately five (5) minutes after Chavarry entered the apartment, Chavarry exited the apartment complex carrying a black bag over his shoulder and a "small pinkish, bluish, flowered, printed small bag that was wrapped up in his hand." (R6-71-72, 117; Govt. Ex 7-8). After Chavarry walked to the Chevy Blazer, an officer approached, questioned Chavarry, and subsequently found seven kilo size packages of suspect cocaine in the black bag.[5] (R6-45-46,73-78).

Upon learning that kilograms of suspect cocaine were seized, officers went upstairs to the apartment and observed Barreto exit, empty handed. (R6-26-29,49). Upon searching Barreto, the officers found no drugs or money. (R6-37). The apartment door then slammed and locked, and an officer heard someone yelling "police." (R6-28-29, 51,102-03). An officer at the back of the apartment observed *Diaz* jumping from a second floor balcony, and Morales with one leg over the balcony. (R6-123-36). The officers then chased, caught, and hand-cuffed *Diaz*. (R6-32-33). Upon searching *Diaz*, the

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[5] The bag contained 4,994 grams. (R6-77-78).

officers found no money, drugs, beepers or cell phones. (R6-37). Further, the officers never swabbed *Diaz* 'hands, nor were his clothes checked to determine if he had any cocaine residue on them, (R6-85-86,116), and none of the evidence was fingerprinted to determine if *Diaz'* prints appeared thereon. (R6-116).

During a security sweep of the apartment, no guns, money, or drug ledgers were found. (R6-103-04, 200-01). The first officer inside the apartment, Morgan, did not testify where he observed any of the cocaine, (R6-229-30), and by the time Agent Collins entered to take the evidence in custody, the items on the kitchen counter were already seized by other individuals. (R6-184-85,197-98).

Although the majority of the cocaine was seized from the two bathrooms, the photographs showed that neither the hallway or master bathroom were visible from the living room. *Govt. Ex. 5-6, 8-9, Def. Sent. Ex. 1-2,5.* Further, the lack of lighting in the master bedroom when the first photographs were taken showed that neither *Diaz* nor anyone else entered the master bedroom or bathroom during the five minutes that *Diaz* was in the apartment. *Compare, Govt Ex. 8 with 9, and Def. Sent. Ex. 5 with 7.*

Moreover, one of the officers testified that the cocaine in the bathrooms was not in plain view. Detective Recio testified that he never saw the cocaine - even though at the time he entered the apartment, he knew that cocaine had been located in the bathroom, and peeked into the bathroom without looking down inside the wall. Specifically, during cross-examination, Detective Recio testified:

Q. Okay. ***Well, when you testified on direct examination, did you say that the cocaine wasn't visible at the time in the bathroom when you looked in there?***

A. When I looked in it –

Q. Wait a minute. Answer my question.

A. Okay.

Q. ***Did you say on direct examination, when you***

peeked in the bathrooms, you couldn't see the cocaine like it is in the picture? Did you say that?

A. ***Yes, I did say that.***

Q. Okay. Now, the cocaine as depicted in the walls are different than when you saw it, correct?

A. No, sir.

Q. What's different? It's not different?

A. The pictures below there, sir, where the cocaine is on there, that's what I was referring to.

Q. Oh, okay.

A. ***That those cocaine kilograms like that on the sink were not like that when I looked through.***

Q. ***Gotcha.***

A. Okay.

Q. ***So, in other words, this picture was after someone took cocaine out of the wall, placed it on there and then took a photograph.***

A. ***Yes, sir.***

Q. ***Gotcha. And when you peeked in there, you said you really couldn't see the cocaine.***

A. ***No, sir.***

Q. ***Am I correct?***

A. ***Yes, sir.***

Q. Now, you already knew there was cocaine found in there, correct?

A. Yes.

Q. You were already expecting to see cocaine in the bathroom, were you not?

A. Yes.

Q. When you went there to peek in?

A. ***Yes. I was looking around.***

Q. ***And you still couldn't see it so well in the wall, could you?***

A. ***No.***

Q. In fact, you had to walk in and look down into the wall to actually see the cocaine.

A. I couldn't answer that because I didn't do it, sir.
Q. But you didn't do that.
A. No, sir.
Q. But going to the doorway of the bathroom you couldn't see the cocaine in the wall.
A. No.

(R6-224-25). (Emphasis added).

Even when the Government attempted to rehabilitate Detective Recio on redirect examination, Recio maintained that he could not see the kilograms in the bathrooms:

Q. When you saw the cocaine in the apartment, it looked like this (indicating)? I'm pointing at -- it was placed the way it is in 5-E?
A. No, sir.
Q. Which way was it placed?
A. ***No. What I said was that when I looked into the bathroom the cocaine was not on there like this.***
Q. ***How did it look when you were in the bathroom?***
A. ***I didn't see it like that.***
Q. Can you just describe the way it looked?
A. It was -- well, ***I didn't see it. I didn't see the cocaine.***

(R6-226-27). (Emphasis added).

As a result, the cocaine in the bathrooms clearly was not in plain view to anyone unless they (1) walked down the hall, (2) walked into the bathroom, *and* (3) looked down into the wall where a medicine cabinet would be hung.

Similarly, no testimony or evidence showed that *Oscar Diaz* saw the contents of the duffle bag that Chavarry placed in the Chevy Blazer, that the duffle bag was handed to Chavarry while *Oscar Diaz* was inside the apartment, or that the duffle bag came from inside the apartment. Moreover, no testimony or evidence indicated that *Diaz* discussed any numbers or quantities of monies, drugs or other objects, touched any of the cocaine, packaging, paraphernalia or

money, had any cocaine residue on him, had any money that would indicate that he had been just involved or would be involved in any cocaine trafficking offenses, or that his fingerprints were present anywhere in the apartment where any cocaine was stored. (R6-188-89,193-98).

ARGUMENT I

THE LANGUAGE IN THIS COURT'S OPINION IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000) PROVIDING THAT "ANY FACT [OTHER THAN A PRIOR CONVICTION] THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE *PRESCRIBED STATUTORY MAXIMUM*" REFERS TO THE MAXIMUM SENTENCE PRESCRIBED UNDER THE UNITED STATES SENTENCING GUIDELINES, BECAUSE AS THIS COURT EXPLAINED IN *UNITED STATES V. R.L.C.*, 503 U.S. 291 (1992), THE SENTENCING GUIDELINES ARE STATUTES.

A. The U.S. Sentencing Guidelines Are Statutes and a Defendant's Sentence May Not Exceed the Lowest Maximum Sentence after Application of the Guidelines and Limitations on Sentences Set Forth in the Charging Statutes:

The United States Sentencing Guidelines are clearly a creature of statute that impose upper and lower limits on a sentencing court. This Court has previously rejected the Government's attempt to argue that an "authorized" sentence only refers to the penalty provisions in the charging statute, rather than the limitations imposed through the Sentencing Guidelines in ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992). In ***R.L.C.*** this Court held that the penalty provisions of the charging statute setting forth the maximum possible penalty are not to be given primacy over the maximum possible penalty permissible under the

Sentencing Guidelines. ***R.L.C.***, 503 U.S., at 298, 112 S.Ct., at 1334.

The district court in ***R.L.C.*** found that R.L.C., a juvenile, committed an act of juvenile delinquency within the meaning of 18 U.S.C. § 5031, because his acts would have been the crime of involuntary manslaughter in violation of 18 U.S.C. §§ 1112(a) and 1153 if committed by an adult. The maximum sentence for involuntary manslaughter under 18 U.S.C. § 1112(b) was three years. At R.L.C.'s dispositional hearing, the district court granted the Government's request to impose the maximum penalty for respondent's delinquency and accordingly committed him to official detention for three years.

Despite the manslaughter statute's provision for an adult sentence of that length, the United States Court of Appeals for the Eighth Circuit, vacated R.L.C.'s sentence and remanded for resentencing, after concluding that 36 months exceeded the cap imposed by 18 U.S.C. § 5037(c)(1)(B) upon the period of detention to which a juvenile delinquent may be sentenced. 915 F.2d 320 (1990).

The government filed a petition for certiorari review to the Supreme Court, arguing -- as the Government has in most post-***Apprendi*** cases -- that the maximum penalty authorized under the statute refers to the charging statute; not the maximum under the Sentencing Guidelines. This Court rejected the Government's argument as follows:

> The Government suggests a straightforward enquiry into plain meaning to explain what is "authorized." It argues that the word "authorized" must mean the maximum term of imprisonment provided for by the statute defining the offense, since only Congress can "authorize" a term of imprisonment in

punishment for a crime. As against the position that the Sentencing Guidelines now circumscribe a trial court's authority, the Government insists that our concern must be with the affirmative authority for imposing a sentence, which necessarily stems from statutory law. It maintains that in any event the Sentencing Commission's congressional authorization to establish sentencing guidelines does not create affirmative authority to set punishments for crime, and that the Guidelines do not purport to authorize the punishments to which they relate.

But this is too easy. The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory. See 18 U.S.C. § 3553(b). More significantly, ***the Government's argument that "authorization" refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate, seems to us to beg the question.*** Of course it is true that no penalty would be "authorized" without a statute providing specifically for the penal consequences of defined criminal activity. The question, however, is whether Congress intended the courts to treat the upper limit of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult

> case would bar imposition up to the limit, and an unwarranted upward departure [503 U.S. 298] from the proper Guideline range would be reversible error. § 3742. Here it suffices to say that the Government's construction is by no means plain. ***The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.*** This, indeed, is arguably the more natural construction.

R.L.C., 503 U.S. 291,298, 112 S.Ct. 1329, 1334. ***Mistretta v. United States,*** 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).[6]

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[6] While ***Apprendi*** itself concerned only the New Jersey hate crime statute, there are numerous suggestions in the majority, concurring, and dissenting opinions that the case's scope may be quite broad indeed. Justice Thomas's concurrence argued that any fact that alters the range of punishments to which a defendant is exposed must be found by a jury, *see id.* at 2379-80, acknowledging that his proposed rule might invalidate the Sentencing Guidelines themselves. *See id.* at 2380 n. 11. Justice Scalia's concurrence maintained that "all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." *Id.* at 2367. Justice O'Connor's dissent expressed concern that the Court's holding "will have the effect of invalidating significant sentencing reform accomplished over the past three decades." *Id.* at 2394. And Justice Breyer, a key figure in the development of the Sentencing Guidelines, lamented that "the rationale that underlies the Court's rule suggests a principle ... that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to [sentencing] commissions)." *Id.* at 2402.

As a result, this Court's holding in ***Apprendi,*** that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt," applies to the statutory maximums set forth in the United States Sentencing Guidelines if such are lower than the maximums set forth in the charging statute. 120 S.Ct. at 2362-63 (emphasis added).

Accordingly, the maximum possible sentence for the Petitioner under the Sentencing Guidelines would consist of a base offense level of 12 with a sentencing range of 15 to 21 months, as provided for a 25 gram level set forth in Section 2D1.1 of the United States Sentencing Guidelines.

B. Alternatively, where the Determination of an Essential Element of an Offense (Other than Recidivism) Removes the Discretion of the Sentencing Court by Requiring the Defendant to Receive a Mandatory Minimum Sentence, That Element must Be Determined by a Jury Beyond a Reasonable Doubt.

The majority responded to these allegations simply by noting that "[t]he Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. *See, e.g.,* ***Edwards v. United States***...." *Id.* [523 U.S. 511, 118 S.Ct. 1475] at 2366 n. 21. ***Edwards,*** the only case cited by the majority, was quoted for the proposition that "a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." 523 U.S. 511, 515, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998). The Court did not cite ***Mistretta v. United States,*** 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), the case that originally upheld the constitutionality of the Sentencing Guidelines, nor did it address the holding in ***R.L.C.,*** that the Sentencing Guidelines are a statute and that the statutory character of a specific penalty provision such as 21 U.S.C. § 841, does not give it primacy over administrative sentencing guidelines.

In the instant case, once the District Court determined by a preponderance of the evidence that over 5 kilograms of cocaine were attributable to *Oscar Diaz,* and that Mr. *Diaz* had one prior drug felony conviction, under 21 U.S.C. § 841(b)(1)(A), a 20 year sentence was *mandatory*, even though it was merely the maximum sentence applicable under 21 U.S.C. § 841(b)(1)(C) - where the minimum sentence is zero. Based upon a similar case, the Sixth Circuit recently vacated a defendant's sentence in ***United States v. Strayhorn***, - F.3d -, 2001 WL 536548 (6th Cir., May 22, 2001), because "[t]he judge's determination effectively limited the range of applicable penalties and deprived [the defendant] of the opportunity to receive a less than life imprisonment without the possibility of release." *Id., quoting* ***United States v. Flowal,*** 234 F.3d 932, 937 (6th Cir. 2000). ***Almendarez-Torres v. United States,*** 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) does not proscribe the reasoning of ***Strayhorn,*** because ***Almendarez-Torres*** only concerned recidivism as a sentencing factor of Title 8 U.S.C. § 1326, and did not require the sentencing court to find any other fact, such as the quantity of drugs attributable to the defendant.

ARGUMENT II

BEFORE INCREASING A DEFENDANT'S STATUTORY MAXIMUM SENTENCE FROM FORTY YEARS TO LIFE IMPRISONMENT ON THE BASIS OF THE QUANTITY OF ILLEGAL DRUGS A DEFENDANT A CONSPIRED TO IMPORT IN A DRY CONSPIRACY, THE PROSECUTION MUST PROVE THE QUANTITY OF ILLEGAL DRUGS BEYOND A REASONABLE DOUBT TO A JURY.

A. Under The Due Process Clause Of The Fifth Amendment And The Notice And Jury Trial Guarantees Of The Sixth Amendment Any Fact (Other Than Recidivism), That Increases The Maximum Penalty For A Crime, Including The Quantity of Illegal Drugs That A Defendant Agreed to Import, Must Be Charged In An Indictment, Submitted To A Jury And Proven Beyond A Reasonable Doubt.

The Eleventh Circuit's affirmance of *Diaz's* conviction and sentence, and denial of his Petition for Rehearing and Rehearing *En Banc*, directly conflict with the decisions of this Court in ***Apprendi*** and ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In ***Apprendi,*** this Court squarely held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, 120 S.Ct. at 2362-63.

After the Eleventh Circuit affirmed *Diaz's* conviction and sentence and denied his petition for rehearing and suggestion for rehearing *en banc*, this Court reversed and remanded numerous drug cases for reconsideration in light of ***Apprendi.***[7] See note 8 below. Like the cases this Court has

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[8] The following drug cases were reversed and remanded for further consideration in light of ***Apprendi: United States v. Humphrey,*** 210 F.3d 373 (6th Cir.2000)(unpublished)(trial court properly calculated of amount of cocaine), *rev'd,* 121 S.Ct. 478, - L.Ed.2d - (Nov.13, 2000); ***United States v. Whitt,*** 211 F.3d 1022 (7th Cir.2000)(sustained trial court's findings regarding quantities of drugs based upon witness testimony at trial), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Hughes,*** 213 F.3d 323 (7th Cir. 2000)(same), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States***

reversed and remanded for further consideration, the indictment in this case failed to charge the threshold amount of cocaine necessary to support the enhanced penalty provisions of the charging statute, and the jury instructions and verdict form failed to direct the jury to make a factual finding beyond a reasonable doubt as to the quantity of drugs that *Diaz* possessed or conspired to. (R1-1,4,17; Ct. Ex. 1-3). Accordingly, at the minimum, this Court should reverse and remand this case for further consideration in light of ***Apprendi*** and ***Jones.***

However, this case also presents this Court with the following issues of national importance:

(a) As set forth in Argument I, whether the language in ***Apprendi*** *supra,* referring to the "prescribed statutory maximum," refers to the maximum sentence prescribed under the United States Sentencing Guidelines, because as this Court explained in ***United States v. R.L.C.,*** 503 U.S. 291 (1992), the Sentencing Guidelines are statutes?

(b) Whether ***Apprendi*** and/or ***Jones*** require the complete reversal of a conviction due to lack of jurisdiction? and,

(c) Assuming that this Court's holdings in ***Apprendi***, and/or ***Jones,*** only require a the trial court to

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v. Smith, 215 F.3d 1331 (7th Cir. 2000)(type and quantity of drugs sentencing factors), *rev'd,* - U.S. -, 121 S.Ct. 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Hester,*** 199 F.3d 1287 (11th Cir.2000)(amount of marijuana involved not an element of offense that gov't had to prove beyond a reasonable doubt), *rev'd,* - U.S.-, 121 S.Ct 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Jones,*** 194 F.3d 1178 (10th Cir. 1999)(a sentencing judge can consider quantities of drugs not charged in information or indictment or proven at trial when determining sentence, and quantities proven at trial do not dictate mandatory minimum), *rev'd,* - U.S. -, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000).

resentence a defendant whose conviction was obtain in violation thereof, whether the trial court must resentence the defendant to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

(1) The Quantity of Drugs That A Defendant Intended to Import Is An Essential Element of 21 U.S.C. §§ 841 and 846.

To comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense. In ***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), this Court noted that:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id., at 243, n. 6, 119 S.Ct. 1215.

The federal carjacking statute examined in ***Jones,*** set forth a choice of three maximum penalties, two of which were dependent on proof of facts that did not need to be present in the indictment or decided by the jury. 526 U.S. at 229, 119 S.Ct. 1215. The basic statute provided a fine or imprisonment of not more than 15 years for the offense of carjacking, 18 U.S.C. § 2119(1), but if serious bodily injury resulted, the maximum time in prison was 25 years, § 2119(2), and if death resulted, the maximum was life imprisonment, § 2119(3).

Similarly, in the instant case, Title 21 U.S.C. § 841,

requires a factual finding to determine if the violation of the applicable statute set forth in subsection (a) involved 5 kilograms or more of cocaine under subsection (b)(1)(A), or over 500 grams but less than 5 kilograms of cocaine under subsection (b)(1)(B).

Furthermore, like the indictment in Jones's case, which made no reference to the subsections of the statute, nor did it charge either that the defendant had inflicted serious bodily injury on the victim or death, the indictment herein wholly fails to identify the penalty provisions imposed after trial. *Diaz's* Indictment not only failed to identify which portion of section 841(b) the government sought to impose, it failed to cite to section 841(b) altogether, and further failed to state any specific quantity of cocaine that *Diaz* possessed or conspired to possess. (R1-22).

The lower courts in ***Jones*** held that the additional facts that triggered § 2119(2) and (3) were nonetheless sentencing factors, but the Supreme Court reversed, holding that the Fifth Amendment Due Process Clause of the Fifth Amendment and Sixth Amendment notice and jury trial require any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6, 119 S.Ct. 1215. *Id.* at 249, 119 S.Ct. 1215.

(2) The failure of an Indictment to Charge an Essential Element of and Offense, Requires Reversal of a Conviction.

The requirement that an indictment contain all the elements of the offense provides a defendant with notice and protection from double jeopardy. See Const. Amd V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"); Const. Amd. VI ("the accused shall enjoy the right ... to be informed of the nature and cause

of the accusation"). An indictment also "limit[s] [the defendant's] jeopardy to the offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." ***Stirone v. United States,*** 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Furthermore, the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The Second Circuit examined this issue in the context of the federal firearm statute where the defendants plead guilty to the simple firearms offense, but were enhanced one conviction for discharge of a firearm and imposed a 10 year consecutive sentence for violation of § 924(c) in connection with a different bank robbery. Instead of merely reversing for resentencing, the court remanded for resentencing or reindictment. ***United States v. Tran,*** 234 F.3d 798 (2d Cir., 2000). The indictments in ***Tran*** charged the defendants with a simple § 924(c) firearms offense, to which the defendants plead guilty. *Id.* at 803. Recognizing that the notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established, the Second Circuit held that the district court acted outside its jurisdiction in sentencing the defendants for the enhanced firearms offenses not charged in their indictments. ***Tran,*** at 805-807, *citing,* ***Ex parte Bain,*** 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)(indictment found by a grand jury indispensable to the power of the court to try defendant for crime charged).

Similarly, the indictment the grand jury returned against *Diaz* in the instant case, failed to set forth any notice that the enhanced penalty provisions of § 841(b) by either citing to the statute or specifying the quantity of cocaine that

the grand jury found that *Diaz* possessed or conspired to possess. Accordingly, the district court was without jurisdiction to try or sentence *Diaz*, because the grand jury did not charge *Diaz* with an essential element of the offense charged.

However, some Circuit courts have required defendants to either satisfy a plain error standard, or a harmless error standard after passing a stringent test to prove that a constitutional objection was raised. *See,* ***United States v. Candelario,*** 240 F.3d 1300 (11th Cir.2001), *pet. cert. filed,* (May 4, 2001)(No.00-9956). Such conflicts with the Fifth and Sixth Amendments to the U.S. Constitution. See Argument II(A)(1), *supra.*

B. Alternatively, Where a Defendant's Drug Conviction Violates *Apprendi* or *Jones,* The Defendant Should Be Resentenced To The Lowest Level Under The United States Sentencing Guidelines For The Drug Specified in the Indictment and Charging Statute.

As set forth in the points above, in instances such as the instant case where the Indictment fails to allege the penalty provision which would provide the trial court with jurisdiction to impose a minimum mandatory sentence or the quantity of drugs specified in said statute, then the trial court is without jurisdiction to sentence (as well as convict), the defendant.

In the event this Court does not rule that the indictment must be dismissed, the Petitioner submits that inasmuch as the petit jury found him guilty of a cocaine conspiracy for an unstated quantity of cocaine, that the trial court would only have authority to sentence him to the lowest quantity of cocaine specified in the United States Sentencing Guidelines.

Accordingly, *Diaz* submits that the highest base offense level applicable, would be a level 12.

CONCLUSION

For all the foregoing reasons, therefore, *Oscar Diaz* respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 29th day of May, 2001, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Madeline Shirley, Esq.,*** Assistant U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

RHONDA A. ANDERSON, ESQ.
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FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR DIAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 29th day of May, 2001, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Madeleine R. Shirley, Esq.,*** Assistant U. S. Attorney, Chief-Appellate Division, Office of the U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

Rhonda A. Anderson, Esq.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 99-00303 CR-UNGARO-BENAGES
MAGISTRATE JUDGE BROWN
21 USC 846
21 USC 841(a)(a)
18 USC 2
21 USC 853

UNITED STATES OF AMERICA

v.

RAFAEL CHAVARRY, JR.,
RAFAEL FERNANDO BARRETO,
RAFAEL CALISTO MORALES
and
OSCAR DIAZ

_____/

INDICTMENT

The Grand Jury charges that:

COUNT I

On or about April 15, 1999, in Miami-Dade County, in the Southern District of Florida, the defendants,

RAFAEL CHAVARRY, JR.,
RAFAEL FERNANDO BARRETO,
RAFAEL CALISTO MORALES
and
OSCAR DIAZ,

did knowingly and intentionally combine, conspire, confederate and agree with each other and others unknown to the Grand Jury, to possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT II

On or about April 15, 1999, in Miami-Dade County, in the Southern District of Florida, the defendants,

RAFAEL CHAVARRY, JR.,
RAFAEL FERNANDO BARRETO,
RAFAEL CALISTO MORALES
and
OSCAR DIAZ,

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

FORFEITURE

As a result of the felony offenses alleged in Counts I and II of this Indictment, the United States is entitled to forfeiture of, and the defendants, RAFAEL CHAVARRY, JR., RAFAEL FERNANDO

BARRETO, RAFAEL CALISTO MORALES and OSCAR DIAZ, shall forfeit to the United States any property constituting and derived from any proceeds the defendants obtained, directly or indirectly, as the result of such violations, and property used and intended to be used, in any manner or part, to commit and to facilitate the commission of said violations, including fifty-two thousand dollars ($52,000.00) in United States currency, recovered from defendant RAFAEL CHAVARRY, JR., on April 15, 1999; pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

_____

FOREPERSON

_____

THOMAS E. SCOTT
UNITED STATES ATTORNEY

_____

LOIS FOSTER-STEERS
ASSISTANT UNITED STATES ATTORNEY

August 23, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

OSCAR DIAZ,

RHONDA A. ANDERSON,
ESQ. Defendant's Attorney
Case No.: 1:99CR00303-001

JUDGMENT IN A CRIMINAL CASE
(For offenses Committed On or After November 1, 1987)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) __.
- ☐ pleaded nolo contendere to count(s)___which was accepted by the court.
- ☒ was found guilty on count(s) One and Two after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21 USC§846	Conspiracy to Possess With Intent to Distribute Cocaine	04/15/1999	One
21 USC§841	Possession with Intent to Distribute Cocaine	04/15/1999	Two

The defendant is sentenced as provided in pages 2 through 6 of the judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)__.

☒ Count(s) all remaining counts are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security No.: 264-67-4899
Defendant's Date of Birth: 07/18/1963
Defendant's U.S.M. No.: 59372-004
Defendant's Residence Address:
Miami Federal Detention
Miami, FL 33128
Defendant's Mailing Address: Same
Miami Federal Detention
Miami, FL 33128
Date of Imposition of Judgment: 11/05/99

_____
Signature of Judicial Officer
Ursula Ungaro-Benages
U.S. District Judge

11/5/99
Date

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

IMPRISONMENT

THE defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total **term** of **240 month(s)**

☒ The court makes the following recommendations to the Bureau of prisons:

The Court Orders that the defendant be placed in facility with the highest level of Drug treatment which may include the Triade Drug treatment Program where the defendant is considered for release into a half way house one year before his scheduled release date.

The Court also recommends that the defendant be placed in a South

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ___ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on ___.

- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years.**

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

☒ **The defendant shall not possess a firearm as defined in 18 USC § 921.** (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such time or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of

Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if applicable).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the prob. officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons

engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the prob. officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B(Rev. 8/96)Judgment in a Criminal Case: Sheet 5, Part A-Criminal Monetary Penalties

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Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payment set forth on Sheet 5, Part B.

	Assessment	**Fine**	**Restitution**
Totals:	$200.00		

☐ If applicable, restitution amount ordered pursuant to plea agreement. $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of _____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below:

** If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee(s)	***Total Amount of**	**Priority Order or of % of Payment**
TOTALS:	$	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

AO 245B(Rev. 8/96)Judgment in a Criminal Case: Sheet 5, Part B-Schedule of Payments

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessments; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

☒ In full immediately; or

☐ $___ immediately, balance due (in accordance with the following): or

☐ not later than____; or

☐ in installments to commence ___ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

☐ in ___ (e.g., equal, weekly, monthly, quarterly) installments of $__ over a period of ___ year(s) to commence ___ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal

monetary penalties:

- ☐ Joint and Several:
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall **forfeit** the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense level: 32

Criminal History Category: III

Imprisonment Range: 240 due to enhancement 21 USC 851

Fine Range: $17,500.00 to $16,000,000.00

☐ Fine waived or below the guideline range because of inability to pay.

Total amount of Restitution: $0

☐ Restitution is not ordered because of the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order out weighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996 that require

the total amount of loss to be states, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

The court will impose a sentence at the low end of the guidelines range in consideration of the defendant's age.

OR

☐ The sentence **departs** from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance, pursuant to 5K1.1

☐ for the following specific reason(s):

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-15009
Non-Argument Calendar

D.C. Docket No. 99-00303-CR-UUB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

OSCAR DIAZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 11, 2001)

Before BIRCH, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Oscar Diaz ("Diaz") appeals his conviction and 240-month sentence for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1). He argues that: (1) there was insufficient evidence to support his convictions; (2) the district court improperly restricted cross-examination of a government witness; (3) the district court improperly refused to instruct the jury on his "theory of defense"; (4) the district court erred at sentencing when it determined the amount of cocaine attributable to him; and (5) the district court erred at sentencing when it found that it lacked authority to depart downward.

After review, we affirm.

I. BACKGROUND

The South Broward Drug Enforcement Unit ("DEU")[1] conducted surveillance of a house in southwest Miami-Dade County and a Toyota Tercel parked outside the house. Officers observed Diaz drive his Toyota Tercel to two different houses in southwest Miami-Dade County. The second house belonged to coconspirator Rafael Morales ("Morales"). Diaz and Morales spoke briefly behind the gated entrance to Morales' house with coconspirator Rafael Barreto ("Barreto"). After this brief meeting, Morales and Barreto, driving in Morales' black Acura, followed Diaz, driving in his Toyota Tercel, to a nearby shopping center.

At the shopping center, Diaz parked his car and walked toward the black Acura. Morales and Barreto got out of the black Acura and briefly conversed with Diaz. After the conversation, Diaz and Barreto went to public pay phones while Morales sat on the curb. During that time, Diaz and Barreto each made several

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[1] The DEU is a multi-agency task force comprised of both federal law enforcement officers from the Drug Enforcement Administration ("DEA"), United States Customs Service, Federal Bureau of Investigation ("FBI"), Border Patrol, and local law enforcement officers from Hallandale, Miramar, Davie, and Cooper City, Florida. The unit focuses on drug and money laundering cases. The DEU's investigation in this case was part of an ongoing investigation of narcotic distribution in the South Florida area.

phone calls and frequently looked at their pagers. At one point, Diaz left for approximately twenty minutes to go to a bakery inside the shopping center, while Morales and Barreto remained outside and talked to each other. Once Diaz returned, Morales received a page on his pager and showed his pager to Diaz. All three men went to a pay telephone and Morales placed a brief call. After the call, the three men walked together to the black Acura. Diaz left his Toyota Tercel at the shopping center and returned with Morales and Barreto to Morales' house in the black Acura.

Officers then followed the black Acura back to Morales' house where Diaz, Morales, and Barreto only stayed inside for about three to four minutes. Diaz, Morales, and Barreto returned to the black Acura and drove to a second shopping center. They circled the parking lot until they saw coconspirator Raphael Chavarry ("Chavarry") waving to them from a white Chevrolet Blazer. Morales, Diaz, and Barreto drove up next to the white Chevrolet Blazer and met briefly with Chavarry.

Thereafter, Diaz, Morales, and Barreto returned to the black Acura and left the parking lot. Chavarry followed the black Acura to Barreto's apartment complex. Diaz, Morales, Barreto, and Chavarry walked up to Barreto's second floor apartment carrying no bags. Approximately ten to fifteen minutes later, Chavarry left the apartment carrying a black duffel bag over his shoulder and a small floral-print bag in his hand. Chavarry then placed the two bags in his Chevrolet Blazer.

Before Chavarry drove away, DEU officers approached Chavarry and asked him what were in the two bags. Chavarry told DEU officers that the bags contained cocaine. Based on this information, DEU

officers searched the two bags, finding approximately seven kilograms of cocaine and $15,800. At that point, the officer placed Chavarry under arrest and searched his person, finding an additional $3,499. A further search of the Chevrolet Blazer revealed an additional $38,980 stashed in the vehicle's center console.

Meanwhile, several DEU officers went upstairs to the second floor apartment and saw Barreto, the lessee of the apartment, leaving the front door. DEU officer Okamoto and another officer, walked with Barreto toward a wall outside the apartment and identified themselves as police officers. At that time, someone inside the apartment slammed and locked the front door. The officers heard scuffling inside the apartment and someone yelling "police" and "policia." DEU officers than observed Morales drop a plastic bag off the second floor balcony of the apartment building and attempt to jump from that balcony. DEU officers scaled the side of the building to the second floor balcony and arrested Morales. The plastic bag was recovered and determined to contain cocaine. Diaz jumped from the same second floor balcony and ran for approximately 100 yards, before being apprehended by DEU officers.

Officer Okamoto and other DEU officers entered the relatively small apartment and conducted a security sweep. One officer saw cocaine, in plain view in an open shoe box on the kitchen counter. In the open kitchen cabinets, officers saw several 1" x 1" plastic bags, additional cocaine, and a sifter used for sifting cocaine. Officers saw cocaine, also in plain view, in the two bathrooms in a space created by removing the vanity mirrors from the wall in both bathrooms. The doors to both bathrooms and the master bedroom were open.

In a subsequent search of the apartment, agents

seized cocaine from the kitchen, both bathrooms, and master bedroom. Furthermore, agents found a lease agreement on the floor of the master bedroom closet, which showed that Barreto had lease the apartment. Agents found two cellular telephones in the apartment, one with the name "Oscar"--Diaz's first name--displayed on the screen. Call records for each telephone showed that calls were made from each telephone to the other prior to their arrival at the apartment. The total weight of the cocaine seized from the apartment, the black bag placed in Chavarry's automobile, and the plastic bag dropped from Barreto's second floor apartment balcony was approximately fourteen kilograms.

II. PROCEDURAL HISTORY

On April 23, 1999, a federal grand jury issued an indictment against Diaz, Barreto, Morales, and Chavarry, charging them with one count of conspiracy with intent to distribute cocaine, in violation of 21 U.S.C. §§846 and 841(a)(1), and one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. §941(a)(1). Diaz pleaded not guilty. Barreto, Morales, and Chavarry entered guilty pleas prior to trial. The government filed a pretrial notice of information of one of Diaz's prior felony narcotics convictions to support a mandatory sentencing enhancement under 21 U.S.C. §841(b)(1)(A)(ii)(II). After a four-day trial, the jury found Diaz guilty on both counts of the indictment. Diaz then filed a motion for a new trial, which was denied after a hearing by the district court.

Diaz filed a motion for a downward departure arguing that his prior criminal convictions over-represented his criminal history and that other personal matters warranted a departure. The government opposed the motion, asserting that the district court

lacked authority to grant a downward departure from the statutorily-mandated sentence. At the sentencing hearing, the district court found that it lacked authority to grant Diaz's request for a downward departure and sentenced him to a statutory mandatory 20 years' imprisonment, pursuant to 21 U.S.C. §841(b)(1)(A)(ii)(II), to be followed by 10 years' supervised release. Diaz objected and timely filed this appeal.

III. DISCUSSION

A. Sufficiency of the Evidence

Diaz asserts that the evidence was insufficient to support his conviction on both counts of the indictment. We review de novo sufficiency of the evidence claims. See United States v. Starrett, 55 F.3d 1525, 1552 (11th Cir. 1995). We view all evidence in the light most favorable to the government and draw all reasonable inferences and credibility determinations in favor of the government. See id. A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence. See United States v. Camargo-Vergara, 57 F.3d 993, 997 (11th Cir. 1995).

1.Conspiracy with the Intent to Distribute Cocaine

To support a conviction for conspiracy with the intent to distribute cocaine, the government must prove beyond a reasonable doubt that a conspiracy existed between two or more persons, (2) that the defendant knew of the conspiracy, and (3) the defendant knowingly and voluntarily participated in the conspiracy. See United States v. Andrews, 953 F.2d 1312, 1318 (11th Cir. 1992). The government need not prove that the defendant had knowledge of all details or phases of a conspiracy, but only that the defendant knew the essential nature of the conspiracy. See id.

"Thus, a defendant may be guilty of conspiracy even if he or she joined it midway, or played only a minor role in the total scheme." Id.; United States v. Freeman, 660 F.2d 1030, 1035 n.1 (5th Cir. Unit B Nov. 1981)(holding that, although mere presence is inadequate to establish guilt, "it is material, highly probative, and not to be discounted").

A conspiracy may be proven by either direct or circumstantial evidence. If circumstantial evidence is relied on, "reasonable inferences, and not mere speculation, must support the jury's verdict." United States v. Brazel, 102 F.3d 1120, 1131 (11th Cir. 1999)(citing United States v. Lopez-Ramirez, 68 F.3d 438, 440 (11th Cir. 1995)). Close association with a coconspirator or "mere presence" at the scene of crime is insufficient evidence of knowing participation in a conspiracy. See Andrews, 953 F.2d at 1318. Knowing participation may be established through proof of surrounding circumstances such as acts committed by the defendant which further the purpose of the conspiracy. See id. A defendant may be culpable even if he or she played a minor role in the conspiracy, because a conspirator need not know the details of each act making up the conspiracy. See Brazel, 102 F.3d at 1131.

After review, we conclude that the evidence of Diaz's activities considered was clearly sufficient to support his conviction for conspiracy with intent to distribute cocaine. Indeed, Diaz's activities were totally consistent with the government's charge that Diaz, Barreto, and Morales were involved in a drug transaction, or at a minimum drug distribution, with Chavarry. Considering the evidence in the light most favorable to the government, Diaz: (1) first met with Barreto and Morales; (2) then led Morales and Barreto

to the first shopping center to use pay telephones away from Diaz's and Morales' residences; (3) consulted with Morales about pages they received; (4) traveled with Morales and Barreto to a second shopping center to meet Chavarry; (5) then went to the cocaine stash apartment nearby with Chavarry following him; (6) had Chavarry enter the apartment with them and then watch Chavarry leave with seven kilograms of cocaine; (7) being in an apartment that was essentially used as a cocaine stash house with an open box of cocaine on the kitchen counter, kilograms of cocaine visible in the bathrooms, more cocaine in the kitchen and bedroom, and cocaine weighing, sifting, and packaging equipment; and (8) unsuccessfully trying to flee from police after they had stopped Barreto outside the apartment. While each fact alone is not sufficient, the facts considered together are more than sufficient to support Diaz's conviction.

Given the evidence, a jury could reasonably determine that Diaz's activities at the two parking lots went beyond "mere presence" and were not coincidental to the conspiracy. Indeed, Diaz's activities far exceeded the activities of other defendants whose conspiracy convictions were upheld by this Court. See United States v. Gutierrez, 931 F.2d 1482, 1487 (11th Cir. 1991) (upholding a conspiracy conviction for a coconspirator whose activity was limited to "looking around" in two parking lots and fleeing from a second parking lot in his vehicle).

The facts in this case, and acts of Diaz, go well beyond the acts of those in each of the cases upon which Diaz relies. For example, Diaz relies on United States v. Hernandez, 896 F.2d 513 (11th Cir. 1990), where this Court found that the evidence against one defendant was insufficient to support his conviction

under 21 U.S.C. §846. See id. at 519-20. In Hernandez, (1) the defendant was present in a codefendant's car when the codefendant delivered a package to an undercover officer; (2) the defendant walked away after catching the undercover officer's eye; (3) the defendant talked into a "dead" telephone at a nearby Burger King after walking from the site of the transaction; and (4) the defendant had a prior cocaine possession conviction. See id. In concluding that the evidence was insufficient to prove the conspiracy and possession with intent to distribute charges, this Court was persuaded by the fact that all the activity involving the defendant occurred in the few minutes between arrival of the coconspirator's car and the defendant's departure when the package was given to the undercover officer. See id.

Unlike the defendant in Hernandez, Diaz was not merely fortuitously present with his coconspirators for a brief period of time at one location. Diaz was with the coconspirators for several hours, traveled with them to various locations, and willfully participated in suspicious behaviors with them. Furthermore, unlike the cocaine concealed in a bag in Hernandez, some cocaine in this case was openly visible while Diaz was inside the apartment. Moreover, unlike the defendant in Hernandez, Diaz was an active participant by using pay telephones at a shopping center to return pages, rather than using his home telephone, Morales' home telephone, or his or Morales' cellular telephones--an act clearly made in an attempt to avoid eavesdropping or wiretapping of their telephone conversations immediately prior to the cocaine transaction with Chavarry. Finally, Diaz's flight from the police was obvious. In contrast, it was unclear in Hernandez whether the defendant was fleeing as he only walked

away from the undercover officer because he did not run and there was no indication that he was aware that the undercover officer was, in fact, a police officer.[2]

Viewing all evidence in the light most favorable to the government, with all reasonable inferences weighed in favor of Diaz's guilt, Diaz's actions during the hours prior to the drug transaction and at Barreto's apartment complex, when viewed together, sufficiently demonstrate his participation and agreement in the cocaine possession conspiracy.

2.Possession with Intent to Distribute Cocaine

Diaz also asserts that the evidence was insufficient to support his conviction for possession with intent to distribute cocaine. To prove possession with intent to distribute cocaine, the government must prove three elements by either direct or circumstantial evidence: (1) knowledge of one's possession; (2) actual or

---

[2]Diaz also argues that his convictions should be reversed based on this Court's decisions in United States v. Jenkins, 779 F.2d 606 (11th Cir. 1986) and United States v. Kelly, 749 F.2d 1541 (11th Cir. 1985). Unlike Jenkins and Kelly, where the defendants were "merely present" during a drug transaction, Diaz's activities go well beyond mere presence. For several reasons articulated in our distinguishing of the facts in Hernandez, and after viewing the facts in the light most favorable to the government, we find that the evidence supports the government's position that Diaz was an active participant in the drug transaction, or at least drug distribution, with Chavarry.

constructive possession of a controlled substance; and (3) intent to distribute that substance. See 21 U.S.C. §841(a)(1); United States v. Cooper, 203 F.3d 1279, 1286 (11th Cir. 2000); United States v. Wilson, 183 F.3d 1291, 1298-99 n.13 (11th Cir. 1999). Constructive possession is proven "'by showing ownership or dominion and control over the premises on which the drugs are concealed.'" United States v. Gamboa, 166 F.3d 1327, 1331 (11th Cir. 1999)(quoting United States v. Hernandez, 896 F.2d 513, 520 (11th Cir. 1990)).

However, a defendant can be found vicariously liable of possession of cocaine by a coconspirator even without evidence of his own actual or constructive possession. See Pinkerton v. United States, 328 U.S. 640, 647-48 (1946)(holding that a defendant found guilty of a conspiracy offense may be found guilty of the substantive offense to the conspiracy, even though he, the defendant, did no more than join the conspiracy); see also United States v. Mothersill, 87 F.3d 1214, 1218 (11th Cir. 1996)("Each party to a continuing conspiracy may be vicariously liable for substantive criminal offenses committed by a co-conspirator during the course and in furtherance of the conspiracy, notwithstanding the party's non-participation in the offenses or lack of knowledge thereof."); United States v. Gallo, 48 F.3d 502, 504 (11th Cir. 1995). Therefore, we need not reach the question of whether Diaz had possession, actual or constructive, of the seized cocaine because, even without this evidence, he may still be found liable of the possession of cocaine charge on vicarious liability grounds under Pinkerton.

These elements are required in order to be held vicariously liable under Pinkerton for a substantive offense of a coconspirator, such as possession of

cocaine with the intent to distribute: (1) there must be proof of a conspiracy of which the defendant charged is a member; (2) the substantive offense committed by a coconspirator must have been in furtherance of the conspiracy and fell within its scope; and (3) the substantive offense must have been reasonably foreseeable as a natural and probable consequence of the unlawful agreement. See United States v. Clavis, 956 F.2d 1079, 1087 (11th Cir. 1992)(citing Pinkerton, 328 U.S. at 647-48).[3]

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[3]The district court in this case instructed the jury concerning both vicarious liability and aiding and abetting:

The guilt of a defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the defendant are willfully directed or authorized by the defendant, or if the defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the defendant responsible for the conduct of that other person just as though the defendant had engaged in such conduct himself.

However, before any defendant can be held

As discussed above, the evidence was sufficient to support the conclusion that Diaz willfully participated in a drug conspiracy with Chavarry, Barreto, and Morales. Coconspirator Chavarry was found in possession of seven kilograms of cocaine-enough evidence to constitute the substantive offense under 21 U.S.C. §841(a)(1)-shortly after leaving coconspirator Barreto's apartment. Furthermore, viewing the evidence in the light most favorable to the government, Diaz led Chavarry to Barreto's apartment, which was used as a stash house for the cocaine transferred to Chavarry. Based on all of this and the evidence detailed above, it is reasonable to conclude that the cocaine found in the apartment and in the bag placed in Chavarry's Chevrolet Blazer was part of the action taken in furtherance of a conspiracy involving Diaz, Chavarry, Barreto, and Morales, and that the possession of that cocaine could be foreseen as a natural and probable consequence of the unlawful agreement between these coconspirators. Accordingly, this evidence cumulatively was sufficient to support Diaz's conviction for possession with intent to distribute cocaine.

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criminally responsible for the conduct of others, it is necessary that the defendant willfully associate himself in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the defendant was a willful participant and not a merely knowing spectator.

Alternatively, even disregarding the Pinkerton analysis, we find that the government's evidence supports a reasonable conclusion by the jury that Diaz willfully aided and abetted his coconspirators in the possession with the intent to distribute cocaine. To prove aiding and abetting, the government must show the following: (1) that a substantive offense was committed; (2) the defendant associated himself with the criminal venture; and (3) the defendant committed some act which furthered the crime. See Bazemore v. United States, 138 F.3d 947, 949 (11th Cir. 1998); 18 U.S.C. §2. Because the evidence was sufficient to show that Diaz aided and abetted the drug transaction, Diaz is punishable as a principal actor in that transaction. See 18 U.S.C. §2(a).[4]

C. The District Court's Limitation of Cross-

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[4]Title 18, of the United States Code, Section 2 provides, in relevant part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. §2(a).

Count two of the indictment of Diaz specifically refers to this aiding and abetting statute as follows:

> Oscar Diaz, did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Examination of a Government Witness

Diaz asserts that the district court improperly limited his cross-examination of Detective Okamoto. Diaz claims that restriction of the cross-examination of Detective Okamoto led to the exclusion of "exculpatory facts" that violated his Fifth and Sixth Amendment right to a fair trial.[5] We review limitations on the scope and extent of cross-examinations for an abuse of discretion. See United States v. Matthews, 168 F.3d 1234, 1244 (11th Cir. 1999). Even where an abuse of discretion occurs, non-constitutional evidentiary errors do not warrant reversal absent a showing that the defendant's substantial rights were affected. See United States v. Sellers, 906 F.2d 597, 601 (11th Cir. 1990). After careful review of the trial transcripts, it is clear that the district court did not abuse its discretion by limiting the cross-examination of Detective Okamoto. Detective Okamoto testified to: (1) his participation in the surveillance; (2) his encounter with Barreto outside of the apartment; and (3) his participation in a security sweep of the apartment. On direct examination, the government did not question Detective Okamoto on what he saw within the apartment during the security sweep.

On cross-examination, defense counsel attempted to widen the scope of the inquiry to include whether

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[5]Diaz contends that cocaine was not in plain view in Barreto's apartment. The color photos attached to Diaz's brief support the DEU officers' testimony that the cocaine was in plain view in the kitchen and both bathrooms.

Detective Okamoto saw cocaine during the security sweep. The government objected and the district court sustained the objection on the grounds that the cross-examination was beyond the scope of the direct examination. "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Fed.R.Evid. 611(b). The district court was clearly within its discretion to limit the scope of cross-examination as being beyond the scope of direct examination and, therefore, Diaz's argument is without merit.

In any event, Diaz did not object to the court's ruling limiting the cross-examination to the scope of Detective Okamoto's direct examination. Furthermore, Diaz never made a proffer of what he sought to elicit from Detective Okamoto or why the questions were relevant to Detective Okamoto's testimony. In addition, Diaz never called Detective Okamoto as a witness himself in order to inquire into areas which were beyond the scope of his direct testimony. If Detective Okamoto possessed exculpatory testimony, Diaz could have presented it.

D. The District Court's Refusal to Give a "Theory of Defense" Instruction

Diaz contends that the district court committed reversible error by refusing to give a specific and separate jury instruction on his "mere presence theory of defense." Diaz's proposed instruction is not in the trial record, but Diaz claims the proposed instruction was the one used in United States v. Lyons, 53 F.3d 1198, 1202

(11th Cir. 1995).[6] The record does show that defense counsel asked for an instruction similar to that in Lyons.

We review a district court's refusal to give a requested jury instruction for abuse of discretion. See United States v. Chastain, 198 F.3d 1338, 1350 (11th Cir. 1999). A district court's refusal to give a requested jury instruction warrants reversal only if the requested instruction: (1) was a correct statement of law; (2) was not substantially covered by the charge actually given; and (3) dealt with some point in the trial so important that failure to give the instruction seriously impaired the defendant's ability to conduct his defense. See id.; Lyons, 53 F.3d at 1200. Thus, this Court will reverse only when it is left with "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." United States v. Grigsby, 111 F.3d 806, 813 (11th Cir. 1997).

After careful review of the transcripts, we find that the district court did not abuse its discretion by refusing Diaz's requested instruction. The district court actually proposed adding this sentence to the standard instructions: "In this case Mr. Diaz, or the defendant, asserts that he was merely present." Diaz, however, did not accept the court's offer to add this sentence.

In any event, the jury instructions which the court gave clearly explained that "mere presence" is insufficient to find an individual guilty of conspiracy.

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[6]That instruction states that "even though [the defendants] may have been knowing spectators [during the drug transaction,] they are not guilty." Lyons, 53 F.3d at 1202.

The jury instructions also stated that "knowledge that a crime is being committed [is] not sufficient to establish that a defendant either directed or aided and abetted the crime," and that the jury was required to find "beyond a reasonable doubt that the defendant was a willful participant and not merely a knowing spectator." The district court explained:

I'm not going to give a theory of defense instruction that's covered by the instructions already. But I am willing to, if you'd like, add something on or modify the standard instruction in some way that emphasizes that this is what you're relying on in order to seek an acquittal in the case. It's already in the instructions twice. I don't know why to put it three times.

We find that Diaz's requested jury instruction was substantially covered by the charge actually given to the jury and that failure to give that instruction does not merit reversal. See Chastain, 198 F.3d at 1350. Furthermore, we find that the jury was fully and properly guided in its deliberations by the instructions it was given by the district court. United States v. Grigsby, 111 F.3d 806, 813 (11th Cir. 1997).

E. Drug Quantity Attributed to Diaz During Sentencing

Diaz argues that the district court erred in finding him responsible for the total amount of cocaine seized. He asserts that the cocaine found in the apartment and the duffle bag carried by Chavarry were not in plain view, and, therefore, it was not reasonably foreseeable to Diaz that fourteen kilograms of cocaine were involved.

We review a district court's determination of drug quantity attributable to a defendant during sentencing for clear error. See United States v. Robinson, 935 F.2d 201, 205 (11th Cir. 1991). The district court must

consider all "relevant conduct" when determining the quantity of drugs attributable to the defendant. U.S.S.G. §1B1.3. Where the defendant has participated in jointly undertaken criminal activity, relevant conduct also includes all reasonable foreseeable acts and omissions of others in furtherance of the jointly undertaken activity. See United States v. Ismond, 993 F.3d 1498, 1499 (11th Cir. 1993)(holding that a district court must make individualized findings concerning the scope of criminal activity undertaken by a particular defendant and determine the quantity reasonably foreseeable in connection with that defendant's level of participation in the conspiracy).

After careful review, we find that the record supports the district court's individualized finding that Diaz was accountable for fourteen kilograms of cocaine. In sum, the entire amount of cocaine was reasonably foreseeable to Diaz because, the apartment in which it was stashed was relatively small, there were large unconcealed quantities of cocaine located throughout the apartment, and no attempt was made to hind the cocaine from Diaz. This evidence, along with the evidence of Diaz's actions that day, tend to prove that Diaz was a trusted member of the conspiracy and had knowledge of both the cocaine that was located throughout the apartment and the cocaine obtained by Chavarry while in the apartment.

F. The District Court's Refusal to Grant a Downward Departure During Sentencing

Diaz also argues that the district court erred in refusing to grant his request for downward departure in sentencing him. The district court determined that it did not have the authority to depart downward. A defendant may not appeal a district court's discretionary refusal to depart downward. See United States v.

Gilbert, 138 F.3d 1371, 1373 (11th Cir. 1998). However, this Court may review de novo whether the district court had authority to depart if the refusal to depart was based on the district court's perceived lack of authority. See id. Section §841(b)(1)(A)(ii)(II) mandates a mandatory minimum sentence of not less than twenty years for any person who has a prior felony drug conviction and who commits a violation of 21 U.S.C. §841(a) involving five kilograms or more of cocaine. See 21 U.S.C. §841(b)(1)(A)(ii)(II).

In the present case, Diaz was convicted of possession with intent to distribute cocaine, in violation of §841(a), and he had prior convictions for possession of cocaine and purchase of cocaine. The district court properly determined that the statutory mandatory minimum sentence provisions of §841(b)(1)(A)(ii)(II) applied to Diaz's sentence, and that it did not have the discretion to depart from §841(B)(1)(A)(ii)(II).

In United States v. Simpson, 228 F.3d 1294, 1302-04 (11th Cir. 2000), this Court determined that a district court has no discretion to depart downward from a statutory mandatory minimum sentence, except in these two circumstances: (1) when the government files a motion to recognize the defendant's "substantial assistance" in the investigation or prosecution of another person, or (2) when the defendant falls within the provisions of the "safety valve" embodied in 18 U.S.C. §3553(f). See id. at 1304. Unless one or both of these exceptions exist, a district court does not have the discretion to downward depart. See id.

Here, the government did not file a substantial assistance motion. Nor did Diaz fall under the "safety valve" exception stated in 18 U.S.C. § 3553(f) which requires, among other things, that a defendant not have more than one criminal history point. Diaz had several

prior convictions, and thus five criminal-history points.

Therefore, we find that the district court was bound to impose the statutorily authorized mandatory minimum sentence of 240 months' imprisonment for Diaz's drug convictions and had no discretion to depart downward from 21 U.S.C. S841(b)(1)(A)(ii)(II).

IV. CONCLUSION

For the foregoing reasons, Diaz's convictions and sentence are hereby

AFFIRMED.

CASE NO. 99-15009-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee/Plaintiff,
vs.
OSCAR DIAZ,
Appellants/Defendants.

On Appeal From The United States District Court
For The Southern District of Florida,
Miami Division, Criminal Division
Case No. 99-303-Cr-Ungaro-Benages

PETITION FOR REHEARING OF APPELLANT, OSCAR DIAZ

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, Oscar Diaz, hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq.,
Appellate Counsel for Oscar Diaz

Honorable Ted E. Banstra,
U. S. District Court Magistrate

Rafael F. Barreto, Co-Defendant

Honorable Stephen T. Brown,
U. S. District Court Magistrate

Rafael Chavarry, Jr., Co-Defendant

Honorable Robert L. Dubé,
U. S. District Court Magistrate

Lois A. Foster-Steers, Esq., Assistant U.S. Attorney

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Samuel J. Rabin, Jr., Esq.,
Trial Counsel for Rafael C. Morales

Thomas E. Scott, U.S. Attorney

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Harry M. Solomon, Esq.,
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Harris Sperber, Esq., Trial Counsel for Rafael Chavarry

Honorable William C. Turnoff,
District Court Magistrate

Honorable Ursula Ungaro-Benages,
U. S. District Court Judge

United States of America, Appellee

_____

Rhonda A. Anderson, Esq.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the type size and style in this brief is 14 point Times New Roman Scalable type.

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IN LIGHT OF ***APPRENDI V. NEW JERSEY,*** 530 U.S. ___, 120 S.Ct. 2348 (2000), THIS COURT SHOULD REHEAR THE APPELLANTS' ARGUMENT REGARDING THE DISTRICT COURT'S ERROR IN ASSESSING THAT FIVE KILOGRAMS OR MORE WERE ATTRIBUTABLE TO OSCAR DIAZ, BECAUSE THE JURY MUST DETERMINE THE QUANTITY OF COCAINE BEYOND A REASONABLE DOUBT.

A. The enhancement of the *Oscar Diaz'* sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey*** where: ***(A)*** the offenses charged in the Indictment did not charge *Diaz* with an offense involving five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 841, ***(B)*** the trial court did not instruct the jury to determine the quantity of cocaine, and ***(C)*** *Oscar Diaz'* sentence was enhanced from a minimum of ten (10) years to twenty (20) years based upon the trial court's factual finding that the quantity of drugs attributable to *Diaz* was five (5) kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A) 10

B. An Indictment that does not allege the minimum quantity of drugs required under the charging statute fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from a maximum of 10 years to 20 years imprisonment based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine 13

C. A trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey*** to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute 15

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STATEMENT OF FACTS NECESSARY FOR REHEARING

The indictment charging *Oscar Diaz* failed to allege that any specific quantity of cocaine was involved in the offenses charged.[1] (R1-22). Similarly, neither the jury instructions nor the verdict form required the jury to find that either offense involved any specific or minimum quantity of cocaine. (R1-103, 106-13-15).

At sentencing, *Oscar Diaz* vigorously objected to the quantity of cocaine, and requested a downward departure for minor role and from the career criminal enhancement. (R1-115, 117). The PSR attributed a total of 14,043 grams of cocaine to *Diaz* by arguing that the cocaine was in "plain view" or was otherwise foreseeable. *Diaz* argued that the cocaine was not in plain view, and the evidence failed to show that he had constructive possession of the cocaine, because the evidence did not show that: (1) *Oscar Diaz* observed or knew that the duffle bag that defendant Chavarry picked up during the five (5) minutes that Chavarry was in apartment 209 contained any cocaine, (2) *Oscar Diaz* entered the hallway or master bathroom of apartment 209, or observed or knew that either bathroom had cocaine secreted in the walls; (3) *Oscar Diaz* observed any cocaine inside the apartment,[2] and/or (4) the

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[1]Conspiracy to possess with intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 846, and possession with intent to distribute a quantity of cocaine in violation of Title 21 U.S.C. 841(a)(1) and Title 18 U.S.C. § 2.

[2]Based upon the lower purity of the cocaine on the kitchen counter, a properly instructed

apartment was an obvious stash house. (R1-115).

However, for the purposes of sentencing, *Diaz* argued that the most that the Government could argue that he could have observed was the 994.1 grams 45% pure cocaine located on the kitchen counter - - which was approximately *half* the purity of all the other cocaine found in the bathrooms or duffle bag. (R1-114,115; R6-103-4,114-15, 137; R11-80-89).

After denying all of *Oscar Diaz'* objections except as to the fine, the District Court sentenced *Diaz* to a 20 year term of imprisonment, followed by a term of 10 years supervised release. (R2-160). *Diaz* is presently serving the 20 year sentence at FMC-Devens, Ayer, Massachusetts. (R2-160-2).

Evidence at Trial

On April 15, 1999, an officer surveilled a residence in Southwest Dade County that was "part of an ongoing investigation," and observed a dark colored Toyota Tercel parked outside. (R6-9,11). After surveilling the residence for approximately four and one-half hours, the officer observed *Oscar Diaz* exit the residence alone, with nothing in his hands, enter the Toyota and drive off to another unspecified residence where he exited empty handed, and entered for approximately ten minutes. *Diaz* then exited the residence - empty handed, and drove off in the Toyota. (R6-11-13).

The officer next surveilled *Diaz* drive to Rafael

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jury could have found that Diaz only conspired and intended to possess or attempt to possess with the intent to distribute the cut cocaine.

Morales' house (his cousin). (R6-13-14,42). When *Diaz* arrived, several individuals were standing outside of the Morales residence. *Diaz* exited the Toyota - again empty handed, and walked over and talked for a couple of minutes to Morales and Rafael Barreto. (R6-14). No officer or other witness overheard the conversation. (R6-15,44-45).

Thereafter, *Diaz* reentered the Toyota and backed out of the driveway. (R6-14). In the meantime, Morales and Barreto entered a black Acura, backed out, and followed *Diaz's* vehicle to a shopping plaza in Miami, where he parked and left it. (R6-15).

After arriving at the shopping plaza, *Diaz* exited the Toyota and walked toward the Acura. While *Diaz* walked toward the Acura, Morales and Barreto exited and walked toward two pay phones at the shopping center with *Diaz* accompanying them. (R6-15-16). No officer or other witness overheard any conversations, or observed anyone making phone calls. (R6-44-45).

Minutes later, *Diaz* walked alone over to a bakery. (R6-16,44). While *Diaz* was at the bakery, Morales and Barreto conversed. (R6-44-45). *Diaz* later exited the bakery carrying a white paper bag and a coffee cup, and joined Morales and Barreto. (R6-44-45). *Diaz* then used the pay phone while Morales sat on the curb, however, no evidence showed who *Diaz* called or what was discussed. (R6-15-16,44-45).

After approximately twenty minutes, Morales looked down at his belt buckle, removed his "pager" and showed it to *Diaz*. (R6-17-18,46). However, no pager was ever seized from Morales and no evidence showed

that the one beeper that was later found in the Fountainbleau apartment belonged to or was used by Morales, or received a call from anyone that day. (R6-17-18,185-86). During the 20 minute period before Morales allegedly received a beeper call, Morales, *Diaz*, and Barreto "were just talking amongst each other, laughing, having conversations," (R6-17), and none of the men engaged in any counter-surveillance activities. (R6-15-18).

Morales, *Diaz* and Barreto then went over to the pay phones and Morales, ***not*** *Diaz,* placed a phone call. Again, no evidence showed who Morales called or the content of the conversation. (R6-17-18).

Thereafter, Morales, *Diaz* and Barreto walked to and entered the Acura with Morales driving, Barreto in the front passenger's seat, and *Diaz* in the back seat. (R6-18-19). Morales drove the Acura back to his residence, stopped for a few minutes, and then drove to a Winn Dixie grocery store. (R6-64-65,91-92). Upon entering the parking lot, Morales drove up and down the aisles, and then stopped for several minutes next to a white Chevrolet Blazer. (R6-66-67). While stopped by the Blazer, Morales appeared to engage in a conversation with Rafael Charvarry. (R6-65-67,92-94). However, no officer or other witness overheard the conversation. (R6-66-67).

Charvarry then followed Morales to an apartment complex. (R6-67-68,95). Morales, *Diaz* and Barreto exited the Acura and walked toward an archway at the entrance of the building - empty handed. (R68-71,108). Upon reaching the archway, one of the three individuals

motioned for Chavarry to come over to the archway. *Id.* However, no evidence showed that *Diaz* motioned for Charvarry. (*Id.,* R6-81-82).

The four individuals walked upstairs and entered apartment 209. (R6-99-100). Approximately five (5) minutes after Chavarry entered the apartment, Chavarry exited the apartment complex carrying a black bag over his shoulder and a "small pinkish, bluish, flowered, printed small bag that was wrapped up in his hand." (R6-71-72, 117; Govt. Ex 7-8). After Chavarry walked to the Chevy Blazer, an officer approached, questioned Chavarry, and subsequently found seven kilo size packages of suspect cocaine in the black bag.[3] (R6-45-46,73-78).

Upon learning that kilograms of suspect cocaine were seized, officers went upstairs to the apartment and observed Barreto exit, empty handed. (R6-26-29,49). Upon searching Barreto, the officers found no drugs or money. (R6-37). The apartment door then slammed and locked, and an officer heard someone yelling "police." (R6-28-29, 51,102-03). An officer at the back of the apartment observed *Diaz* jumping from a second floor balcony, and Morales with one leg over the balcony. (R6-123-36). The officers then chased, caught, and hand-cuffed *Diaz*. (R6-32-33). Upon searching *Diaz,* the officers found <u>*no*</u> money, drugs, beepers or cell phones. (R6-37). Further, the officers never swabbed *Diaz'* hands, nor were his clothes checked to determine

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[3]The parties stipulated the bag contained 4,994 grams. (R6-77-78).

if he had any cocaine residue on them, (R6-85-86,116), and none of the evidence was fingerprinted to determine if *Diaz'* prints appeared thereon. (R6-116).

During a security sweep of the apartment, no guns, money, or drug ledgers were found. (R6-103-04, 200-01). The first officer inside the apartment, Morgan, did not testify where he observed any of the cocaine, (R6-229-30), and by the time Agent Collins entered to take the evidence in custody, the items on the kitchen counter were already seized by other individuals. (R6-184-85,197-98).

Although the majority of the cocaine was seized from the two bathrooms, the photographs showed that neither the hallway or master bathroom were visible from the living room. *See, Govt. Ex. 5-6, 8-9, Def. Sent. Ex. 1-2,5.* Further, the lack of lighting in the master bedroom when the first photographs were taken showed that neither *Diaz* nor anyone else entered the master bedroom or bathroom during the five minutes that *Diaz* was in the apartment. *Compare, Govt Ex. 8 with 9, and Def. Sent. Ex. 5 with 7.*

Moreover, one of the officers testified that the cocaine in the bathrooms was <u>*not*</u> in plain view. Detective Recio testified that he never saw the cocaine - even though at the time he entered the apartment, he knew that cocaine had been located in the bathroom, and peeked into the bathroom without looking down inside the wall. Specifically, during cross-examination, Detective Recio testified:

Q. Okay. ***Well, when you testified on direct examination, did you say that the cocaine***

wasn't visible at the time in the bathroom when you looked in there?

A. When I looked in it –

Q. Wait a minute. Answer my question.

A. Okay.

Q. ***Did you say on direct examination, when you peeked in the bathrooms, you couldn't see the cocaine like it is in the picture? Did you say that?***

A. ***Yes, I did say that.***

Q. Okay. Now, the cocaine as depicted in the walls are different than when you saw it, correct?

A. No, sir.

Q. What's different? It's not different?

A. The pictures below there, sir, where the cocaine is on there, that's what I was referring to.

Q. Oh, okay.

A. ***That those cocaine kilograms like that on the sink were not like that when I looked through.***

Q. ***Gotcha.***

A. Okay

Q. ***So, in other words, this picture was after someone took cocaine out of the wall, placed it on there and then took a photograph.***

A. ***Yes, sir.***

Q. ***Gotcha. And when you peeked in there, you said you really couldn't see the cocaine.***

A. ***No, sir.***

Q. ***Am I correct?***

A. ***Yes, sir.***

Q. Now, you already knew there was cocaine found

in there, correct?

A. Yes.

Q. You were already expecting to see cocaine in the bathroom, were you not?

A. Yes.

Q. When you went there to peek in?

A. ***Yes. I was looking around.***

Q. ***And you still couldn't see it so well in the wall, could you?***

A. ***No.***

Q. In fact, you had to walk in and look down into the wall to actually see the cocaine.

A. I couldn't answer that because I didn't do it, sir.

Q. But you didn't do that.

A. No, sir.

Q. But going to the doorway of the bathroom you couldn't see the cocaine in the wall.

A. No.

(R6-224-25). (Emphasis added).

Even when the Government attempted to rehabilitate Detective Recio on redirect examination, Recio maintained that he could not see the kilograms in the bathrooms:

Q. When you saw the cocaine in the apartment, it looked like this (indicating)? I'm pointing at -- it was placed the way it is in 5-E?

A. No, sir.

Q. Which way was it placed?

A. ***No. What I said was that when I looked into the bathroom the cocaine was not on there like this.***

Q. ***How did it look when you were in the***

bathroom?

A. ***I didn't see it like that.***

Q. Can you just describe the way it looked?

A. It was -- well, ***I didn't see it. I didn't see the cocaine.***

(R6-226-27). (Emphasis added).

As a result, the cocaine in the bathrooms clearly was not in plain view to anyone unless they (1) walked down the hall, (2) walked into the bathroom, *and* (3) looked down into the wall where a medicine cabinet would be hung.

Similarly, no testimony or evidence showed that *Oscar Diaz* saw the contents of the duffle bag that Chavarry placed in the Chevy Blazer, that the duffle bag was handed to Chavarry while *Oscar Diaz* was inside the apartment, or that the duffle bag came from inside the apartment. Moreover, no testimony or evidence indicated that *Diaz* discussed any numbers or quantities of monies, drugs or other objects, touched any of the cocaine, packaging, paraphernalia or money, had any cocaine residue on him, had any money that would indicate that he had been just involved or would be involved in any cocaine trafficking offenses, or that his fingerprints were present anywhere in the apartment where any cocaine was stored. (R6-188-89,193-98).

ARGUMENT I

IN LIGHT OF *APPRENDI V. NEW JERSEY*, 530 U.S. ___, 120 S.Ct. 2348 147 L.Ed.2d 435 (2000), THIS COURT SHOULD REHEAR THE APPELLANTS' ARGUMENT REGARDING THE DISTRICT COURT'S ERROR IN ASSESSING THAT FIVE KILOGRAMS OR MORE WERE

ATTRIBUTABLE TO *OSCAR DIAZ*, BECAUSE THE JURY MUST DETERMINE THE QUANTITY OF COCAINE BEYOND A REASONABLE DOUBT.

A. The enhancement of the *Oscar Diaz'* sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in *Apprendi v. New Jersey* where: *(A)* the offenses charged in the Indictment did not charge Diaz with an offense involving 5 kilograms or more of cocaine in violation of 21 U.S.C. § 841, *(B)* the trial court did not instruct the jury to determine the quantity of cocaine, and *(C)* Oscar Diaz's sentence was enhanced from a minimum of 10 years to 20 years based upon the trial court's factual finding that the quantity of drugs attributable to Diaz was 5 kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A).

The Supreme Court recently reversed and remanded numerous drug cases for reconsideration in light of ***Apprendi.***[4] Like the cases the court reversed, the

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[4]The following drug cases were reversed and remanded for further consideration in light of ***Apprendi: United States v. Humphrey,*** 210 F.3d 373 (6th Cir.2000)(unpublished)(trial court properly calculated of amount of cocaine), *rev'd,* 121 S.Ct. 478, - L.Ed.2d - (Nov.13, 2000); ***United States v. Whitt,*** 211 F.3d 1022 (7th Cir.2000)(sustained trial court's findings regarding quantities of drugs based upon witness testimony at trial), *rev'd*, - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Hughes,*** 213 F.3d 323 (7th Cir. 2000)(same), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d -

indictment in this case failed to charge the threshold amount of cocaine necessary to support the enhanced penalty provisions of the charging statute, and the jury instructions and verdict form failed to direct the jury to make a factual finding beyond a reasonable doubt as to the quantity of drugs attributable to *Diaz*. *See*, ***United States v. Slaughter,*** - F.3d - , 2000 W.L. 1946670 (5th Cir., Jan. 12, 2001)(although drug quantity should have been expressly stated in jury instructions as elements of offenses charged under 21 U.S.C. 841 and 846, such was harmless error where Indictment contained quantities of drugs and jury had a copy of the indictment during deliberations).

Moreover, the career criminal enhancement that the trial court imposed at sentencing specifically required a factual finding that five kilograms or more of the cocaine was attributable to *Oscar Diaz*. 21 U.S.C. § 841. Under ***Apprendi***, that factual finding which

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(Nov. 6, 2000); ***United States v. Smith***, 215 F.3d 1331 (7th Cir. 2000)(type and quantity of drugs sentencing factors), *rev'd*, - U.S. -, 121 S.Ct. 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Hester,*** 199 F.3d 1287 (11th Cir.2000)(amount of marijuana involved not an element of offense that gov't had to prove beyond a reasonable doubt), *rev'd*, - U.S.-, 121 S.Ct 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Jones,*** 194 F.3d 1178 (10th Cir. 1999)(a sentencing judge can consider quantities of drugs not charged in information or indictment or proven at trial when determining sentence, and quantities proven at trial do not dictate mandatory minimum), *rev'd*, - U.S. -, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000).

doubled *Diaz'* sentence from 10 to 20 years, should have been determined by a jury at an evidentiary standard "beyond a reasonable doubt" – not a mere preponderance. *See,* ***United States v. Yakle,*** - F.3d -, 2001 W.L. 25719 (8th Cir., Jan. 11, 2001)(***Apprendi*** is applicable where a career offender enhancement increases the maximum applicable sentence)(unpublished). *See, Appendix.*

Based upon the facts presented at trial, a properly instructed jury could have readily found that the cocaine in the bathrooms was not in plain view, just like Officer Recio did when he testified that he saw nothing when he looked in the bathrooms. Likewise, the jury could have readily found that the drugs in Chavarry's duffle bag were not attributable to *Diaz,* because the evidence failed to show beyond a reasonable doubt that *Diaz* ever saw or knew about the cocaine in the bag. *Compare with* ***United States v. Mietus,*** - F.3d. -, 2001 W.L. 46572 (7th Cir., Jan. 22, 2001)(although ***Apprendi*** error occurred in jury instructions, no plain error occurred where no evidence showed that defendant could have been found guilty of possessing less than all of the drugs seized, and defendant did not argue that he possessed less than all the boxes containing the drugs).

Accordingly, this Court should reconsider the sentencing issues raised in *Diaz*'s briefs, and remand same for resentencing in light of ***Apprendi***.[5]

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[5]This Court's decision was entered without oral argument.

B. An Indictment that does not allege the minimum quantity of drugs required under the charging statute fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from a maximum of 10 years to 20 years imprisonment based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute 5 kilograms of more of cocaine.

The requirement that an indictment contain all the elements of the offense provides a defendant with notice and protection from double jeopardy. See Const. Amd V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"); Const. Amd. VI ("the accused shall enjoy the right ... to be informed of the nature and cause of the accusation"). An indictment also "limit[s] [the defendant's] jeopardy to the offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." ***Stirone v. United States,*** 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Furthermore, the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged." ***In re Winship,*** 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Recently, the Second Circuit examined this issue in the context of the federal firearm statute where the defendants plead guilty to the simple firearms offense, but were enhanced one conviction for discharge of a firearm and imposed a 10 year consecutive sentence for violation of § 924(c) in connection with a different bank robbery. Instead of merely reversing for resentencing, the court remanded for resentencing or reindictment. ***United States v. Tran,*** - F.3d -, 2000 W.L. 1701651 (2d Cir., Nov. 15, 2000). The indictments in ***Tran*** charged the defendants with a simple § 924(c) firearms offense, to which the defendants plead guilty. *Id.* at 10. Recognizing that the notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established, the Second Circuit held that the district court acted outside its jurisdiction in sentencing the defendants for the enhanced firearms offenses not charged in their indictments. ***Tran,*** at 6, 10, *citing,* ***Ex parte Bain,*** 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)(indictment found by a grand jury indispensable to the power of the court to try defendant for crime charged).

Similarly, the indictment the grand jury returned against *Oscar Diaz* in the instant case, failed to set forth any notice that the enhanced penalty provisions of § 841 by specifying the quantity of cocaine that the grand jury charged *Diaz* with. Accordingly, the district court was without jurisdiction to try or sentence *Diaz,* because the grand jury did not charge *Diaz* with an essential element

of the offense charged.

C. A trial court must sentence a defendant whose drug conviction violates *Apprendi v. New Jersey*, to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute.

In instances such as the instant case where the Indictment fails to allege the penalty provision which would provide the trial court with jurisdiction to impose a minimum mandatory sentence or the quantity of drugs specified in said statute then the trial court is without jurisdiction to sentence (as well as convict), the defendant.

In the event this Court does not rule that the indictment must be dismissed, the *Oscar Diaz* submits that inasmuch as the petit jury found him guilty of a cocaine conspiracy for an unstated quantity of cocaine, that the trial court would only have authority to sentence him to the lowest quantity of cocaine specified in the United States Sentencing Guidelines. Accordingly, *Diaz* respectfully submits that the highest base offense level applicable, would be at level 12.

CONCLUSION

Based on the foregoing reasons and authorities, *Oscar Diaz,* respectfully requests that this Court rehear the matters raised herein.

Respectfully submitted,

RHONDA A. ANDERSON, ESQ.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and exact copy of the foregoing Reply Brief containing 3,561 words (including all headings) was mailed this 1st day of February, 2000, to: ***Madeleine R. Shirley, Esq.,*** Assistant U. S. Attorney, Chief-Appellate Division, Office of the U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-15009-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR DIAZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

February 27, 2001

Before: BIRCH, BARKETT and HULL, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Oscar Diaz is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

Supreme Court, U.S.
FILED
JUL 30 2001

No. 00-1790

In the Supreme Court of the United States

OSCAR DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the district court was required to apply the federal Sentencing Guidelines based solely on the facts that were charged in the indictment and found by the jury beyond a reasonable doubt.

2. Whether *Apprendi* applies to a determination of drug quantity that results in a statutory mandatory minimum sentence, even if that sentence is less than the statutory maximum authorized for the defendant's offense without regard to quantity.

3. Whether the court of appeals was required to vacate petitioner's conviction or his sentence, notwithstanding his failure to raise any *Apprendi*-type claim until he sought rehearing in the court of appeals, because the indictment did not allege that his offenses involved any specific or threshold quantity of drugs.

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In the Supreme Court of the United States

No. 00-1790

OSCAR DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-37) is unpublished, but the judgment is noted at 247 F.3d 246 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2001. A petition for rehearing was denied on February 27, 2001. Pet. App. 62. The petition for a writ of certiorari was filed on May 29, 2001 (the day following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 20 years' imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed.

1. On April 15, 1999, officers of the South Broward (Florida) Drug Enforcement Unit observed petitioner as he drove to two houses in the Miami area. Pet. App. 18; see Pet. 13. At the second house petitioner met with co-defendants Rafael Morales and Rafael Barreto. The three men then drove in two cars to a nearby shopping center, where petitioner and Barreto made several calls from pay phones and consulted their pagers. Pet. App. 18-19. The three eventually met co-defendant Raphael Chavarry at another shopping center, and all four then went to Barreto's apartment. Within about 15 minutes Chavarry emerged carrying a duffel bag and a smaller bag, and got into his car. DEU officers then approached him and asked what was in the two bags. When Chavarry said the bags contained cocaine, the officers searched the bags. They found seven kilograms of cocaine and $15,800 in the bags, $3,499 on Chavarry's person, and another $38,980 in the car. *Id.* at 19-20.

Other officers then went to the apartment and saw Barreto leaving. The other defendants heard the officers and slammed the front door closed. Morales dropped a plastic bag full of cocaine off the second floor balcony, and petitioner jumped from the balcony but was arrested after a short chase. A subsequent search of the apartment revealed more cocaine and drug

paraphernalia. All told, the police seized just over 14 kilograms of cocaine. Pet. App. 20-21; see Pet. 12.

2. A grand jury charged petitioner with "possess-[ing] with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine," and with conspiring to commit that offense. Pet. App. 1-2. The indictment did not allege that either offense involved any particular or threshold quantity of drugs. *Ibid.* Before trial the government also filed an information under 21 U.S.C. 851(a)(1), notifying petitioner that it intended to rely on one of his prior felony drug convictions to support the imposition of a mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A)(ii)(II). See Pet. App. 21.

The jury found petitioner guilty of both offenses. See Pet. App. 21. The district court determined that petitioner should be held responsible at sentencing for all 14 kilograms of cocaine seized from the conspirators. See *id.* at 34. With a total offense level of 32 and a criminal history category of III, petitioner would ordinarily have had a Guidelines sentencing range of 151-188 months' imprisonment. See *id.* at 15; Sentencing Guidelines Ch. 5 (Sentencing Table). Because of the quantity of cocaine attributed to petitioner, he was subject to sentencing under 21 U.S.C. 841(b)(1)(A)(ii)(II), which, for offenses involving five or more kilograms of cocaine, provides a sentencing range of ten years' to life imprisonment for first-time offenders, and twenty years' to life imprisonment for offenders with a prior felony drug conviction. Petitioner has a prior felony drug conviction, and the district court imposed the mandatory minimum sentence of 20 years' imprisonment. See Pet. App. 15, 22, 36.

3. The court of appeals affirmed. Pet. App. 17-37. The court rejected, among other arguments, peti-

tioner's claims that the district court should not have attributed all 14 kilograms of cocaine to him (*id.* at 34-35), and that the district court had the authority to depart downward from the statutory mandatory minimum sentence (*id.* at 35-36).[1]

In a petition for rehearing, petitioner argued for the first time that his convictions and sentence were unconstitutional because the quantity of cocaine attributed to him at sentencing was not charged in the indictment or found by the jury beyond a reasonable doubt. See Pet. App. 38-61. The court of appeals denied rehearing without comment. *Id.* at 62.

ARGUMENT

Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner contends that his convictions, or at any rate his sentences, should be vacated because the amount of cocaine for which he was held responsible at sentencing was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi* the court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Although petitioner was sentenced in November 1999 (see Pet. App. 5), more than six months after this Court decided *Jones* v. *United States*, 526 U.S. 227 (1999) (which "foreshadowed" the holding in *Apprendi*, see 530 U.S. at 476), he raised no *Jones*- or *Apprendi*-

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[1] The court also rejected petitioner's challenges to the sufficiency of the evidence (Pet. App. 22-30), to the district court's limitation of cross-examination of a witness (*id.* at 30-32), and to the court's failure to give a theory-of-defense instruction (*id.* at 32-34). Petitioner does not renew those claims here.

type claim either in the district court or in his briefs on appeal. The claims he now advances were first presented to the court of appeals in a petition for rehearing. See Pet. App. 38-61. Petitioner's claims are thus subject, at most to review for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993).

1. Petitioner argues (Pet. 19-23, 26, 30) that every sentencing range defined by the federal Sentencing Guidelines "prescribe[s]" a "statutory maximum" sentence under *Apprendi*, see 530 U.S. at 490. He therefore contends that a defendant must be sentenced within the lowest Guidelines range potentially applicable to the offense of conviction, unless every fact or circumstance that would increase that range has been charged in the indictment and found by the jury beyond a reasonable doubt. See Pet. 23, 30. That argument lacks merit.

This Court has upheld the use and operation of the Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and it has made clear that so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" facts that establish the Guidelines sentencing range, such as type and quantity of drugs under Guidelines § 2D1.1(c)). *Apprendi* does not hold otherwise. See 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject

beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515).

The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors"—such as the amount of contraband involved in an offense—that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). Moreover, a district court has the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). The Guidelines thus leave the sentencing court with significant discretion in imposing a sentence within the statutory range. And specific offense characteristics and sentencing adjustments under the Sentencing Guidelines can never cause a sentence to exceed the applicable statutory maximum. See Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"). Accordingly, nothing in *Apprendi* suggests that use of the Guidelines is constitutionally problematic.[2]

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[2] Petitioner's reliance (Pet. 19-22) on *United States* v. *R.L.C.*, 503 U.S. 291 (1992), is misplaced. The question in that case was whether the sentence imposed on a juvenile exceeded the maximum permitted by the special statutes applicable to federal juvenile proceedings. See 18 U.S.C. 5001 *et seq.* The Court held that references in 18 U.S.C. 5037(c), as then in effect, to "the

Every regional court of appeals has rejected the argument that *Apprendi* applies to findings that simply help determine what sentencing range is applicable under the Guidelines, without changing the statutory maximum or minimum penalty for the offense. See, *e.g.*, *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001); *United-States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001) (No. 00-10197); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Baltas*, 236 F.3d 27 (1st Cir.), cert. denied, 121 S. Ct. 1982 (2001) (No. 00-9291)); *United States* v. *Williams*, 235 F.3d 858, 862-863 (3d Cir. 2000), petition for cert. pending, No. 00-1771 (filed May 21, 2001); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 121 S. Ct. 1393 (2001) (No. 00-8591); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000); *United States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 121 S. Ct. 1152 (2001) (No. 00-7819); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000). There is no reason for this Court to consider the issue.

2. Petitioner contends briefly (Pet. 23-24) that his 20-year statutory mandatory minimum sentence violates *Apprendi*, because the jury was not required to find beyond a reasonable doubt that his offenses in-

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maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" were best construed to incorporate the upper sentencing limits that would be imposed by the Sentencing Guidelines in the case of an adult who committed a comparable crime. That context-specific statutory holding has no bearing here.

volved the five kilograms or more of cocaine that triggered that sentence. See 21 U.S.C. 841(b)(1)(A)(ii)(II). That is incorrect.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), this Court upheld the constitutionality of a sentencing scheme under which any person convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense. The Court reasoned that such a sentencing scheme "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.* at 87-88.

Apprendi did not disturb the Court's holding in *McMillan*, although it made clear that that holding is limited "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." 530 U.S. at 487 n.13. Because 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999) provides for a maximum sentence of 30 years' imprisonment for a defendant who, like petitioner, has a prior felony drug conviction, without regard to the amount of cocaine involved in an offense, the prison sentence imposed in this case is consistent with that limitation.

Since *Apprendi*, several courts of appeals have refused to disturb sentences imposed under Section 841(b)'s mandatory minimum sentencing provisions, where the district court made findings that triggered a mandatory minimum sentence, but the sentence im-

posed did not exceed the maximum authorized by statute given the findings that were made by the jury beyond a reasonable doubt. See *United States* v. *Rodgers*, 245 F.3d 961, 965-968 (7th Cir. 2001); *United States* v. *Pratt*, 239 F.3d 640, 646-648 (4th Cir. 2001) (term of supervised release); *United States* v. *Williams*, 238 F.3d 871, 877 (7th Cir.), cert. denied, 121 S. Ct. 2232 (2001) (No. 00-9667); *United States* v. *LaFreniere*, 236 F.3d 41, 49-50 (1st Cir. 2001); *United States* v. *Keith*, 230 F.3d 784, 787 (5th Cir. 2000), cert. denied, 121 S. Ct. 1163 (2001) (No. 00-8077); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 933-934 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) (No. 00-6746); see also *United States* v. *Harris*, 243 F.3d 806, 808-810 & n.1 (4th Cir. 2001) (sustaining use of sentencing factors that produce increased mandatory minimum sentences under 18 U.S.C. 924(c)(1)(A) (1994 & Supp. V 1999)); *United States* v. *Sandoval*, 241 F.3d 549, 550-551 (7th Cir. 2001) (same); *United States* v. *Pounds*, 230 F.3d 1317, 1319 & n. 1 (11th Cir. 2000) (same), cert. denied, 121 S. Ct. 1631 (2001) (No. 00-8876).

The Sixth and Ninth Circuits have taken a different approach in reviewing sentences imposed under Section 841(b). In *United States* v. *Ramirez*, 242 F.3d 348, 351-352 (2001), the Sixth Circuit vacated a 20-year mandatory minimum sentence that had been imposed under Section 841(b)(1)(A) and remanded for resentencing, even though the original sentence did not exceed the maximum of 30 years authorized by Section 841(b)(1)(C) for a recidivist defendant whose offense involves any quantity of cocaine. Similarly, in *United States* v. *Velasco-Heredia*, 249 F.3d 963 (2001), the Ninth Circuit vacated a five-year mandatory minimum sentence imposed under Section 841(b)(1)(B), even though that sentence did not exceed the five-year maximum author-

ized by Section 841(b)(1)(D) for trafficking in any quantity of marijuana.[3]

The conflict among these decisions does not warrant review in this case. Decisions after *Ramirez* indicate that the Sixth Circuit recognizes the continued authority of *McMillan* in cases in which a factor limits the court's sentencing discretion within the range otherwise available, without altering the maximum available penalty or creating a separate offense. See *United States* v. *Stafford*, No. 99-5706, 2001 WL 818245, at *10-*11 & n.9 (6th Cir. July 17, 2001) (noting limitations of *Ramirez* line of cases); *United States* v. *Garcia*, 252 F.3d 838, 842-844 (6th Cir. 2001) ("*Apprendi* explicitly applies only in those situations where a factual determination made under a lesser standard of proof than the reasonable doubt standard 'increases the penalty for a crime beyond the [prescribed] statutory maximum.'") (quoting *Apprendi*, 530 U.S. at 490, and distinguishing *Ramirez*); *United States* v. *Strayhorn*, 250 F.3d 462, 470 (6th Cir. 2001). Similarly, in *Velasco-Heredia* the Ninth Circuit made clear that its holding turned on a conclusion that, under Section 841(b), the district court's quantity finding "exposed [the defendant] to a greater statutory maximum punishment, and did not merely limit [the court's] sentencing discretion within a range available under the facts found beyond a reasonable doubt" by the jury. 249 F.3d at 968 (distinguishing *McMillan*); see also *United States* v. *Antonakeas*, No. 99-10002, 2001 WL 682370, at *12 n.11 (9th Cir. June 19, 2001) (finding that an *Apprendi* challenge to a "statutory mandatory *minimum* sentence[]

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[3] The Sixth Circuit denied the government's petition for rehearing en banc in *Ramirez*. A petition for rehearing en banc in *Velasco-Heredia* is pending before the Ninth Circuit.

* * * is foreclosed by *United States* v. *Garcia-Sanchez*, 238 F.3d 1200, 1201 (9th Cir. 2001)"). The conflicting authority is therefore limited to the context of the laddered penalty provisions of Section 841(b). In that context the issue is essentially a transitional one, because, since *Apprendi* was decided, federal prosecutors have routinely charged and proved applicable threshold drug quantities in prosecutions in which sentencing will be governed by those provisions.

In any event, as noted above (see p. 5, *supra*), petitioner's belated *Apprendi* claims are reviewable, at most, for plain error. To be entitled to relief under that standard, petitioner would be required to show that his sentences involved (1) error, (2) that was "plain," (3) that "affect[ed] substantial rights," and (4) that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466-467 (citations omitted). At a minimum, any *Apprendi* error involved in sentencing petitioner to a 20-year mandatory minimum term of imprisonment under Section 841(b)(1)(A), without exceeding the 30-year statutory maximum sentence applicable to each of his offenses under Section 841(b)(1)(C), is not "plain," "clear," or "obvious" under current law. See *id.* at 467-468. This Court has not ruled on the issue, and five courts of appeals have held that there is no such error. Moreover, in this case the arresting officers seized 14 kilograms of cocaine—almost three times the amount necessary to trigger petitioner's mandatory minimum sentence—at the time the conspirators, including petitioner, were arrested. See Pet. App. 20-21. Under those circumstances, petitioner could not demonstrate that any error in sentencing him without obtaining a jury verdict on the issue of drug quantity, but within the applicable statutory maximum, either affected his

substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Cf., *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000) ("If this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved an enhancing quantity of drugs.), petition for cert. pending, No. 00-9633 (filed Apr. 24, 2001).

3. Petitioner also argues (Pet. 26-30) that his mandatory minimum sentence is unconstitutional under *Apprendi* because the fact that triggered it—drug quantity—was not alleged in the indictment. He contends, further, that such an "indictment" error goes to the "jurisdiction" of the district court to try or sentence him, is not subject to the plain-error rule, and can never be harmless. That argument does not warrant review in this case.

a. First, petitioner's position depends not only on his argument concerning the proper standard of review for indictment errors, but also on his argument that *Apprendi* should be extended to require a jury determination beyond a reasonable doubt of any factual determination that triggers a mandatory minimum sentence. That argument is incorrect for the reasons set out above; and petitioner suggests no reason why it is not subject to the ordinary rules of forfeiture and plain-error review, which he cannot satisfy.

b. In any event, even assuming that, because drug quantity triggered a mandatory minimum sentence in this case, it was constitutional error to omit a quantity allegation from the indictment, this Court has recognized that "most constitutional errors can be harmless." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted). The Court has "found an error to be 'struc-

tural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson*, 520 U.S. at 468). In contrast to those errors that have been held to be "structural," the Court has explained, a jury "instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. The omission of an element from an indictment, like the omission of an element from a jury instruction in *Neder*, does not necessarily render a criminal proceeding "fundamentally unfair" or "unreliable." See *United States* v. *Prentiss*, No. 98-2040, 2001 WL 788648, at *9-*11 (10th Cir. July 12, 2001) (en banc); *United States* v. *Angle*, No. 96-4662, 2001 WL 732124, at *1-*2 (4th Cir. June 29, 2001) (en banc); *Nance*, 236 F.3d at 825; *United States* v. *Mojica-Baez*, 229 F.3d 292, 309-311 (1st Cir. 2000), cert. denied, 121 S. Ct. 2215 (2001) (Nos. 00-1256, 00-8464 & 00-8634).

Moreover, as this Court made clear in *Johnson*, 520 U.S. at 466, all claimed errors in federal criminal proceedings, regardless of their nature or seriousness, are subject to the plain-error rules set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection in the district court. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Indeed, even a conclusion that a particular type of error is "structural," or

"so serious as to defy *harmless*-error analysis," suggests only that such error may always "affec[t] substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 468-469 (emphasis added). Under the fourth requirement, a prejudicial error (including a "structural" one) that would clearly be grounds for relief if it was properly preserved is *not* a proper ground for relief if it was *not* preserved, unless it also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 469-470 (quoting *Olano*, 507 U.S. at 736).

Under *Johnson* and *Neder*, petitioner would not be entitled to resentencing based on the omission of drug quantity from the indictment, even if *Apprendi* were extended to apply to facts that trigger a mandatory minimum sentence within the applicable statutory maximum.[4] Existing law did not require such an allegation at the time of indictment or sentencing in this case, and the error petitioner asserts is not "plain" or "obvious" even after *Apprendi*. See *Johnson*, 520 U.S. at 467-468. Petitioner raised no indictment-based objection when the government sought imposition of the mandatory minimum sentence, and he has never claimed that he lacked fair notice of the government's intentions. See Pet. App. 21. Petitioner objected to the quantity of drugs attributed to him, but the lower courts considered and rejected those objections, finding

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[4] There is no basis for petitioner's suggestions (see, *e.g.*, Pet. 26, 28, 30) that *Apprendi* might require that his *convictions* be vacated. Whether or not the indictment should have included quantity allegations as a predicate for imposition of mandatory minimum sentences, it plainly alleged two crimes against the United States, and the jury found petitioner guilty of those offenses.

that petitioner's offenses involved substantially more than the triggering amount. See Pet. App. 34-35. Under these circumstances, even if the failure to charge quantity to support the mandatory minimum sentence were error under an extension of *Apprendi*, petitioner could not satisfy the prerequisites for plain-error relief.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2001

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[5] Petitioner misplaces his reliance (Pet. 29-30) on *Stirone* v. *United States*, 361 U.S. 212 (1960), and *United States* v. *Tran*, 234 F.3d 798 (2d Cir. 2000). In *Stirone*, the defendant preserved at trial a claim that the jury instructions permitted conviction on a ground that varied from the indictment's allegations, and this Court granted relief. In this case, there is no question that the allegations of the indictment and the proof adduced at trial supported conviction and a sentence up to 30 years' imprisonment for a recidivist, see 21 U.S.C. 841(b)(1)(C), and petitioner made no claim of error in the district court. In *Tran*, the court of appeals held that omission from the indictment of a fact necessary to support conviction for an aggravated crime was "jurisdictional" error. But in another case the en banc court of appeals has indicated that it is reconsidering the soundness of *Tran*. See *United States* v. *Thomas*, 248 F.3d 76 (2d Cir. 2001). And neither *Tran* nor *Stirone* involved the omission from an indictment of facts that supported a mandatory *minimum* sentence.

(4)

Supreme Court, U.S.
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No. 00-1790

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR DIAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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29 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the language in this Court's opinion in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) providing that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the *prescribed statutory maximum*" refers to the maximum sentence prescribed under the United States Sentencing Guidelines, because as this Court explained in ***United States v. R.L.C.,*** 503 U.S. 291 (1992), the Sentencing Guidelines are statutes?

II. Whether the Eleventh Circuit's opinion in the instant case regarding the enhancement of the Petitioner's sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) and/or ***Jones v. United States,*** 526 U.S. 277 (1999), where: ***(A)*** the offenses charged in the Indictment did not charge *Diaz* with an offense involving five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 841, ***(B)*** the trial court did not instruct the jury to determine the quantity of cocaine, and ***(C)*** *Oscar Diaz'* sentence was enhanced from a minimum of ten (10) years to twenty (20) years based upon the trial court's

factual finding that the quantity of drugs attributable to *Diaz* was five (5) kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A), even through that statute was not charged in the Indictment?

III. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment after application of the United States Sentencing Guidelines, may be increased from 10 years to 20 years based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

IV. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth

Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's minimum punishment under the penalty provisions of the charging statute, may be increased from a range of zero to 20 years to a range of 20 years to life imprisonment, based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant, who has a prior felony drug conviction, had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

V. Whether a trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) and/or ***Jones v. United States,*** 526 U.S. 277 (1999), to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

VI. Whether the proper standard of review is *per se* reversible error where an Indictment that fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due

Process rights and Sixth Amendment guarantees of notice and jury trial?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-1790

OSCAR DIAZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF OF THE UNITED STATES

Oscar Diaz, Defendant and Appellant in the courts below, respectfully replies to the Brief of the United States as follows:

ARGUMENT I

THE LANGUAGE IN THIS COURT'S OPINION IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000) PROVIDING THAT "ANY FACT [OTHER THAN A PRIOR CONVICTION] THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE *PRESCRIBED STATUTORY MAXIMUM*" REFERS TO THE MAXIMUM SENTENCE PRESCRIBED UNDER THE UNITED STATES SENTENCING GUIDELINES, BECAUSE AS THIS COURT EXPLAINED IN *UNITED STATES V. R.L.C.*, 503 U.S. 291 (1992), THE GUIDELINES ARE STATUTES.

A. The U.S. Sentencing Guidelines are Statutes and a Defendant's Sentence May not Exceed the Lowest Maximum Sentence after Application of the Guidelines and Limitations on Sentences Set Forth in the Charging Statutes.

The Government argues that this Court's ruling in *Mistretta v. United States*, 109 S.Ct. 647 (1989), precludes applying *Apprendi* to the case at bar. Govt.R.p. 5. However, the Government's application of *Mistretta* is misplaced. The "use and operation" of the Guidelines is not threatened by the mandates of *Apprendi*. Nor is the use of a properly instructed jury to reach quantative threshold determinations, beyond reasonable doubt and based upon the evidence presented, inapposite to the holdings and expectations of *Mistretta*. Indeed, as the "guidelines were meant to establish a range of determinate sentences for categories of offenses and defendants according to various

specified factors, 'among others'" [See, ***Mistretta v. U.S.***, 109 S.Ct. 647, at 653], Courts will now be able to apply a wide range of sentences judiciously after the trier of fact has been established by a jury and proven beyond reasonable doubt. The prescribed goals of the United States Sentencing Guidelines can be met by applying the principle of jury determination of facts as directed by ***Apprendi***.[1]

The Petitioner was subjected to increased punishment based on the existence of facts not stated in the indictment, nor instructed to the jury, and not found by the jury beyond a reasonable doubt. As Justice Stevens stated in the lead opinion in ***Apprendi***, it "is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribe range of penalties to which a criminal defendant is exposed." 120 S.Ct., at 2363 (quoting ***Jones v. United States***, 526 U.S. 227, 252, 119 S.Ct. 1215, 1228 (1999)(Stevens, J., concurring). Specifically, inasmuch as the constitutional rule announced

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[1]Congress charged the Commission with three goals: "to assure the meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records...while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and "to reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." ***Mistretta*** at 656, citing **28 U.S.C. § 991(b)(1).**

in ***Apprendi*** relied upon ***Jones***[2], and the sentence in ***Jones*** was struck down – even though it did not exceed the statutory maximum – the rule of ***Apprendi*** is not limited to those instances in which the increased penalty provisions exceed the statutory maximum of the charging statute. *E.g.*, ***United States v. R.L.C.***, 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d. 559 (1992)(the Court rejected the Government's attempt to argue that an "authorized" sentence refers only to the penalty provisions in the charging statute, rather than limitations imposed through the Sentencing Guidelines). As a result, this Court's holding in ***Apprendi***, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt," applies to the statutory maximums set forth in the United States Sentencing Guidelines if such are lower than the maximums set forth in the charging statute. 120 S.Ct. at 2362-63 (emphasis added).

Therefore, each fact that increases a defendant's

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[2]The ***Apprendi*** Court explicitly adopted as its holding "the opinion that we expressed in ***Jones*** [***v. United States***, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d. 311(1999)]." *Id.* at 490, 120 S.Ct. 2348. In ***Jones***, a case involving a federal prosecution, the Court stated that the Fifth and Sixth Amendments require that "any fact (other than a prior conviction) that increases the maximum penalty for a crime, ***must be charged in the indictment***, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243 n. 6, 119 S.Ct. 1215 (emphasis added)

sentencing range, must be submitted to a jury and determined beyond a reasonable doubt. See, ***Apprendi,*** 120 S.Ct. at 2367 (Scalia, J., concurring),("all facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by a jury") and ***Jones***, *Id.* at 243, n. 6, 119 S.Ct. 1215.

Additionally, due process and the constitutional right to a trial by jury demand that facts that substantially increase the "legally prescribed punishment" be found by a jury and established beyond a reasonable doubt. Therefore, in light of ***Apprendi***, it is disingenuous for the Government to argue in sum that, on the one hand, any U.S.C. statute that has, for example, a maximum sentence exposure of 10 years must have all the elements of the offense charged in the indictment, submitted to a jury and proven beyond a reasonable doubt before the defendant in such a case can be sentenced beyond the statutory range – while concomitantly arguing that such constitutional protections do *not* apply in a Guideline sentencing scheme in which a defendant may have an exposure of 20 years imprisonment or, in the extreme, life imprisonment. (Govt.Resp. P. 6-9). In fact, this Court has rejected the argument that the "maximum penalty authorized under the statute" refers to the charging – not the maximum under the Sentencing Guidelines–as follows:

> The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory. See 18 U.S.C. § 3553(b). More

significantly, the Government's argument that "authorization" refers only to what is affirmatively provided by the penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate, seems to us to beg the question. Of course it is true that no penalty would be "authorized" without a statute providing specifically for the penal consequences of defined criminal activity. The question, however, is whether Congress intended the courts to treat the upper limits of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult case would bar imposition up to the limit, and an unwarranted departure [503 U.S 298] from the proper Guideline range would be reversible error. 18 U.S.C. § 3742. Here it suffices to say that the Government's construction is by no means plain. **The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.** This, indeed, is arguably the more natural construction.

R.L.C., U.S., 298, 112 S.Ct., 1334. ***Mistretta v. United States***, 488 U.S. 361, 109 S.Ct., 647, 102 L.Ed.2d. 714 (1989). See, Pet. Brief for Cert., p. 21-22.

ARGUMENT II

BEFORE INCREASING A DEFENDANT'S STATUTORY MAXIMUM SENTENCE ON THE BASIS OF THE QUANTITY OF ILLEGAL DRUGS A DEFENDANT EITHER CONSTRUCTIVELY POSSESSED AND/OR CONSPIRED TO POSSESS WITH INTENT TO DISTRIBUTE, THE PROSECUTION MUST PROVE BEYOND A REASONABLE THE QUANTITY OF ILLEGAL DRUGS BEYOND A REASONABLE DOUBT TO A JURY.

A. UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE NOTICE AND JURY TRIAL GUARANTEES OF THE SIXTH AMENDMENT, ANY FACT [Other Than Recidivism) THAT INCREASES THE MAXIMUM PENALTY FOR A CRIME MUST BE CHARGED IN THE INDICTMENT, SUBMITTED TO A JURY AND PROVEN BEYOND REASONABLE DOUBT.

(1) The Quantity of Drugs That a Defendant Intended to Possess and/or Conspired to Distribute is an Essential Element of 21 U.S.C. §§ 841(a)(1) and 846.

Respondent cites to several Appellate courts

that, since ***Apprendi***, have declined to disturb sentences imposed under Section 841(b)'s mandatory minimum sentencing provisions, where the district court made findings under preponderance of the evidence standard that triggered a mandatory minimum sentence, but the sentence imposed did not exceed the maximum authorized by the charging statute. Govt. Resp., p. 8-9. Respondent avers that this Court's holding in ***McMillan v. Pennsylvania,*** 477 U.S. 79 (1986)[3] was not disturbed by ***Apprendi.***[4]

Respondent then argues that every regional court of appeals has rejected the argument that

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[3] In ***McMillan***, this Court upheld a State minimum mandatory sentencing scheme whereby a judge would determine the imposition the mandatory sentence by preponderance of the evidence.

[4] In ***Apprendi***, while not expressly overruling its prior decision in ***McMillan***, this Court limited ***McMillan*** to cases that did not involve the imposition of sentences more severe than the statutory maximum for the offense established by the jury's verdict. See ***Apprendi***, 120 S.Ct. at 2361, n. 13. More significantly, in ***Apprendi*** this Court did acknowledge "constitutional limits exist to State's authority to define away facts necessary to constitute a criminal offense," *Id.* at 467, citing ***In Re Winship*** 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d. 368, and that "a State's scheme that keeps from the jury facts **exposing defendants to greater or *additional* punishment may raise constitutional concerns."** ***Apprendi.*** at 2350, citing **McMillan** at 85-88. (Emphasis added).

Apprendi applies to findings that simply help determine what sentencing range is applicable under the Guidelines. Govt. Resp. p. 7. However, the Ninth Circuit has held that ***Apprendi*** rendered the sentencing sections of Title 21 U.S.C. § 841(b) unconstitutional. Specifically, the Ninth Circuit examined Title 21 U.S.C.§ 841(b) in light of the "relevant inquiry" this Court set forth in ***Apprendi***, to wit: according to the effect of the statute, rather than its form, to determine whether it exposes a defendant to a greater punishment than authorized by the jury's guilty verdict. ***United States v. Buckland***, 259 F3d 1157, 2001 WL 893440, *Reh'g en banc* granted 2001 WL 1091167 (9th Cir., Aug. 9, 2001). Based upon this analysis, the Ninth Circuit held that Section 841(b)(1)(A) and (b)(1)(B) were unconstitutional. *Id.* See also, ***United States v. Hitchcock***, -F.3d-, 2001 W.L. 951273 (9th Cir., Aug. 23, 2001).

The analysis the Ninth Circuit applied in ***Buckland*** and ***Hitchcock*** is equally applicable here, where the District Court determined by a preponderance of the evidence that over 5 kilograms of cocaine were attributable to *Oscar Diaz*, and because *Mr. Diaz* had one prior drug felony conviction, under 21 U.S.C. §841(b)(1)(A), a 20 year sentence was *mandatory*, even though it was merely the maximum sentence applicable under 21 U.S.C. §841(b)(1)(C)–where the minimum sentence is zero.

Moreover, Petitioner was subjected to the enhanced penalty provisions of § 841(b) without any notice by either citing to the statute or specifying the amount of cocaine that the grand jury found *Diaz* possessed or conspired to possess. For the reasons asserted herein, these enhancements--uncharged and not submitted to the jury to be proved beyond a reasonable doubt–have deprived Petitioner of his substantial rights and rendered the outcome of his trial proceedings inherently unconstitutional.

Significantly, although various circuit courts have said that ***Apprendi*** does not apply where a judge has increased the range of punishment based on the judge's own findings by a preponderance of the evidence, (provided the sentence imposed does not exceed the maximum that Congress fixed by statute for the crime, in some cases life[5]), if those decisions accurately state what the ***Apprendi*** opinion means, then the opinion is a dead letter in most substantial narcotics cases. There is no greater sentence than, for example, life imprisonment for a defendant dealing in five kilograms of cocaine or one kilogram of heroin. A fair reading of ***Apprendi*** would see such an outcome as a violation of the respective defendant's

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[5] See, e.g., ***United States v. Meshack*** 225 F3d 556, 576 (5th Cir. 2000); ***United States v. Garcia,*** 240 F.3d 180, 183 (2nd Cir. 2001); ***United States v. Breen,*** 243 F.3d 591, 599 (2nd Cir. 2001).

(as in the case at bar) constitutional right for the jury to determine all elements by a beyond reasonable doubt standard.

Moreover, since this Court handed down ***Apprendi***, it has granted certiorari in some **forty** cases, twenty six of which are federal drug cases in which the circuit courts approved Guideline sentence increases based not on jury verdicts but on a judge's findings by a preponderance of the evidence. This Court vacated the circuit court judgments, and remanded for further consideration in light of ***Apprendi***. This Court's remands indicate clearly that the reasoning of the ***Apprendi*** decision is not to be restricted to instances where the sentence enhancement will cause a sentence to exceed the statutory maximum. In many of the drug cases remanded, the judges imposed sentences that did not exceed the maximum fixed in the statute. A representative sample of the 26 cases remanded includes cases where the quantity of drugs, the defendant's managerial role in a conspiracy, or possession of a firearm were "sentencing factors" found by a judge merely by a preponderance of the evidence.[6]

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[6] See, *e.g.*, ***United States v. Thomas***, 204 F.3d 381 (2nd Cir. 2000), *cert. granted*, –U.S.–121 S.Ct. 756, 148 L.Ed.2d 659 (2001); ***United States v. Harbin***, 209 F.3d 652 (7th Cir. 2000), *cert. granted*,–U.S.–, 121 S.Ct. 1071, 148 L.Ed.2d 948

Apprendi arose when the New Jersey trial court *enhanced* a defendant based upon a *preponderance of the evidence* for a violation of the State's hate crime law. The enhancement in the New Jersey "hate crime" statute is comparable to the Federal Sentencing Guidelines for threatening or harassing communications (Guideline 2A.6.1) and for threatening to assault with a firearm (Guideline 2A.2.2). Like the district judge following the Guidelines enhancements, the trial judge in New Jersey could increase the sentence based on the judge's own findings by a preponderance of the evidence. In both the State case of ***Apprendi*** and the federal drug cases (as in the case at bar), defendant is deprived of the right to due process of law and the right to a speedy and public trial by an impartial jury. The deprivation is the same in the state cases as it is in the federal cases even though deprivation is accomplished by a statute in state cases and in the federal cases by "Guidelines" which are binding law.

(2001); ***United States v. Valencia,*** 222 F.3d 1173 (9th Cir. 2000), *cert. granted,*–U.S.–, 121 S.Ct. 1222, 149 L.Ed.2d 133 (2001); ***United States v. Brown***, 217 F.3d 247 (5th Cir. 2000), *cert. granted,*–U.S.–, 121 S.Ct. 1072, 148 L.Ed.2d 950 (2001); ***United States v. Jackson***, 213 F.3d 1269 (10th Cir. 2000), *cert. granted,*–U.S.–, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000); ***United States v. Hester***, 199 F.3d 1287 (11th Cir. 2000), *cert. granted,* 531 U.S. 941, 121 S.Ct. 336, 148 L.Ed.2d 270 (2000).

See Argument I, *Supra.*

The fact that a separate State statute causes eventual sentence for an underlying crime to exceed the maximum penalty for that crime has no bearing on the comparable deprivation of the Constitutional rights of the defendants in both the federal and state cases. A defendant's Constitutional rights would not be so violated by a sentencing guidelines system in which all facts exposing the defendant to a particular sentencing range must be included in the indictment and found by a jury to have been proven beyond a reasonable doubt. While such a system may initially prove somewhat inconvenient, compromises for the sake of convenience should not be made at the expense of depriving Petitioner of his rights guaranteed by the United States Constitution.

(2) The Failure of an Indictment to Charge an Essential Element of an Offense, Requires Reversal of a Conviction.

The Government posits that generally only "structural" errors are subject to automatic reversal and then only in a "very limited class of cases." Citing ***Neder v. United States***, 527 U.S. 1, 8 (1999)(quoting ***Johnson,*** 520 U.S. at 468). Govt. Resp., p. 12-13. However, the cases cited by the Government all turn (in part) on the "overwhelming" evidence against the respective defendants. See *Id.* at 2. ("The evidence

was so *overwhelming* that [defendant] did not even contest [the materiality] issue." (Emphasis added); ***United States v. Nance*** 236 F.3D 820 (7th Cir. 2000), ("...there is simply no way on this record that [the jury] could have failed to find that [defendant] was conspiring to distribute 5 grams or more of crack cocaine."). A constructive error is harmless if "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the errors" such as when the quantity of drugs attributable to a defendant is undisputed. ***United States v. Nealy*** 232 F.3d 825, 830 (11th Cir. 2000). Thus, the harmless error standard is only appropriate for small errors or defects that have little, if any, likelihood of having changed the result of the trial. ***Neder*** at 1838, 1839 (quoting ***Chapman v California,*** 386 U.S. 18, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

In contrast, the evidence regarding the quantity of drugs attributable to *Mr. Diaz* was hotly disputed - as was the evidence of his knowing participation.. After *Diaz* was detained, the ensuing search of his person yielded <u>no</u> money, <u>no</u> drugs, and <u>no</u> beepers or cell phones. (R6-37)(Pet. Brief, p. 15-16). Further, no evidence showed that *Diaz'* had cocaine residue on his hands or clothing, (R6-85-86, 116)(Pet. Brief, p. 16), and no evidence showed that *Mr. Diaz'* fingerprints were on any of the drugs or drug paraphernalia, (R6-116)(Pet. Brief, p. 16). A search of the apartment (which was rented by co-defendant Barreto) yielded

no guns, money or drug ledgers. (R6-103-04, 200-01).

Moreover, no testimony or evidence showed that *Oscar Diaz* saw or knew there was drugs in the duffel bag that Chavarry placed in a Chevy Blazer, or that the duffel bag was loaded with the drugs in *Diaz'* presence, or that the duffel bag came from the apartment, since no officer surveilled Chavarry exit from Barreto's apartment with the bag in his hand.

Additionally, no testimony or evidence indicated that *Diaz* discussed any numbers or quantities of monies, drugs or other objects, touched any cocaine packaging, paraphernalia or money, had any money that would indicate that he had just been involved or would be involved in any cocaine trafficking offenses, or that his fingerprints were present anywhere in the apartment where any cocaine was stored.

Significantly, even the District Court Judge during the argument on post conviction motions commented: *"[n]ow, I have said it before and I'll say it again that this case is a close case.* (R10-34). Clearly, viewing the evidence in the light most favorable to the Government, there was substantially less than "overwhelming" evidence against Petitioner. Such an error resulting in a dramatic increase in Petitioner's sentencing exposure based on facts not submitted to a jury and proved beyond a reasonable doubt has so "seriously affect[ed] the fairness,

integrity or public reputation of the judicial proceedings" herein, (***United States v. Olano***, 507 U.S. 725, 736 [1993]) that such error constitutes a "structural defect" of serious magnitude requiring reversal and remand. Therefore, in the interest of justice and adherence to the principles of the United States Constitution, such an error can never be "harmless." Accordingly, *Oscar Diaz'* judgment and sentence must be reversed. ("[S]entence must be reversed if the record contains evidence that could rationally lead to a contrary finding with respect to drug quantity.") See ***Neder*** 119 S.Ct. at 1837.

Moreover, the failure of the indictment to allege the drug quantity or specific penalty provision deprived the District Court of jurisdiction to sentence Petitioner. As a result, the trial court lacked jurisdiction to impose any sentence. *See e.g.*, ***United States v. Longoria***, 259 F3d 363 (5th Cir. 2001)(failure of indictment to charge a drug quantity and specific reference to 21 U.S.C § 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration), *rehr,g en banc granted*,–F.3d–, 2001 WL 946413 (5th Cir., Aug. 15, 2001).

Inasmuch as the lack of jurisdiction may be

raised at any time,[7] this issue was timely raised, and requires reversal of the conviction and sentence imposed herein. *See* ***United States v. Gonzalez***, 259 F.3d 355, 359 (5th cir. 2001), *reh'g en banc granted* (5th Cir. 2001)(explained that because of the jurisdictional "nature" of the error, evidence of the drug quantity at trial or the defendant's acknowledgment of the quantity was irrelevant and could not cure the grand jury's lack of notice of the quantity element (which was an element only because it was used to enhance the sentence). *See id.* at 360, n. 3.

Accordingly, where an indictment does not allege a drug quantity, the evidence adduced at trial supporting the trial court's finding of the drug quantity is "not relevant" and may not be used to enhance a defendant's sentence beyond what is

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[7] In ***Apprendi***, this Court did not address the indictment issue because the Presentment Clause of the Fifth Amendment has not been made applicable to states via the Fourteenth Amendment. *See* ***Apprendi*** at 477, n. 3, 120 S.Ct. 2348. However, in ***Apprendi***, this Court contrasted the state prosecution before it with the federal prosecution challenged in ***Almendarez-Torres v. United States***, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *See* ***Apprendi***, 530 U.S. at 477, n. 3, 120 S.Ct. 2348. In ***Almendarez-Torres***, this Court stated that *if* U.S.C. §1326(b)(2) "constitute[d] a separate crime, then the Government must write an indictment that mentions the additional element." *See* 523 U.S. at 226, 118 S.Ct. 1219.

charged in the indictment. *Id.* Thus, the lower courts' use of the drug quantities adduced at trial in affirming the sentence imposed, directly conflicts with the Fifth Circuit's opinion in ***Gonzalez***.

Finally, where the grand jury did not indict the Petitioner as to all elements of the enhanced offense such as Title 21 U.S.C. §841(b)(1)(A), the grand jury's omission of an element is a jurisdictional defect, resulting in reversible error *per se* without proof of prejudice. *See,* ***United States v. Alvarez,*** 735 F.2d 461, 468 (11th Cir. 1984)(present indictment cannot properly serve as the basis for sentences in excess of five years, where quantity element absent from indictment). [8] *See also,* ***Stirone v. United States***, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)(deprivation of fight to be tried only on charges returned by grand jury "is far to serious to be treated...as harmless error"); ***United States v. Gayle,*** 967 F.2d 483, 485 (11th Cir. 1992)(*en banc*); ***United States v. Fern***, 155 F3d 1318, 1324-25 (11th Cir. 1998); ***United States v. Meacham,*** 626 F.2d 503, 510 (5th Cir. 1980)(objection that indictment fails to charge an offense is a non-waivable jurisdictional

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[8] Although ***Alvarez*** has not been followed by the lower court since ***United States v. Coy***, the court in ***United States v. Maslin***, F.Supp.2d-, 2000 WL 1294254 (N.D.N.Y. Sept. 14, 2000), held that after ***Apprendi***, "it appears that the validity of ...***Alvarez***...has been reinstated").

defect).

CONCLUSION

For all the foregoing reasons, therefore, *Oscar Diaz,* respectfully submits that this Court should grant his Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 8th day of October, 2001, to: ***Theodore B. Olson, Acting Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Madeline Shirley, Esq.,*** Assistant U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

RHONDA A. ANDERSON, ESQ.